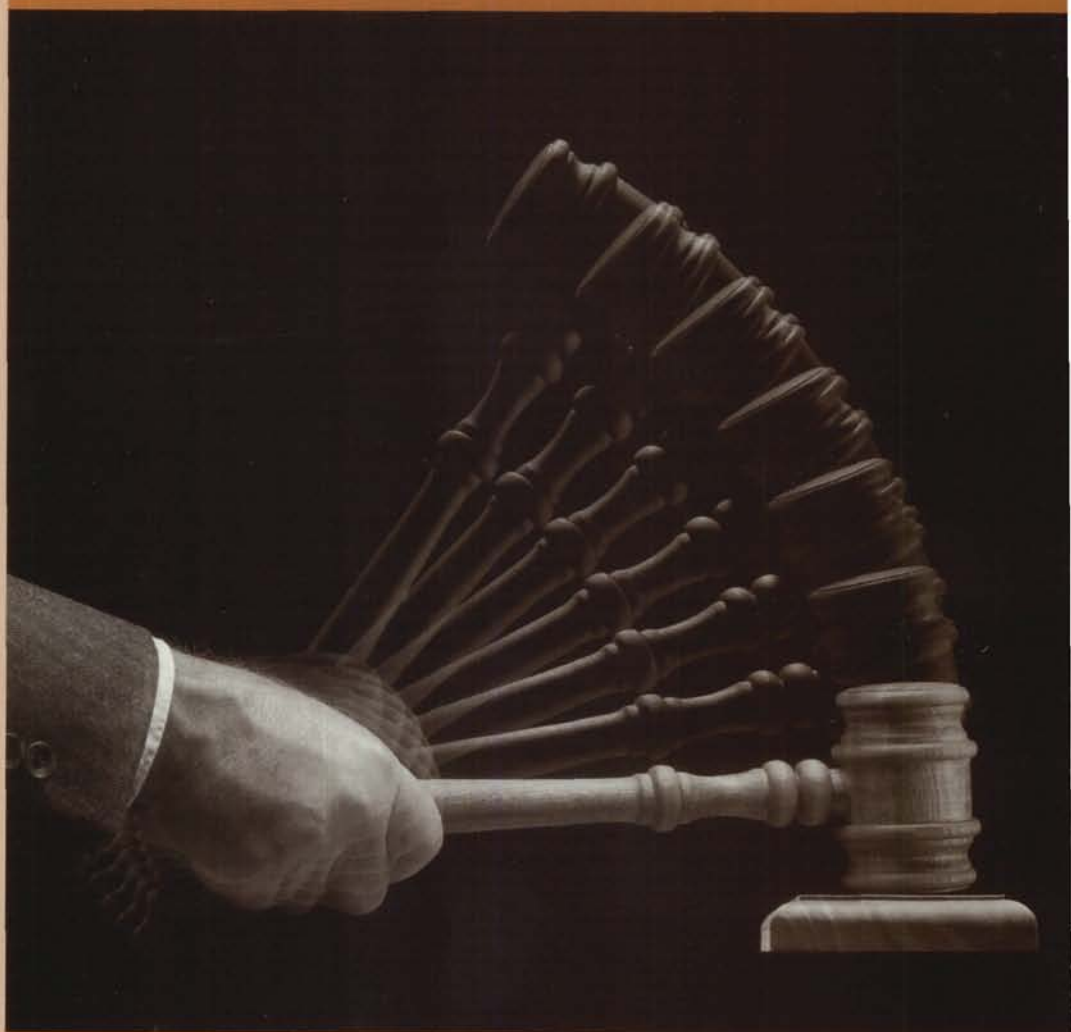
The INDEPENDENT REVIEW

A Journal of Political Economy



Volume II
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Winter 1998

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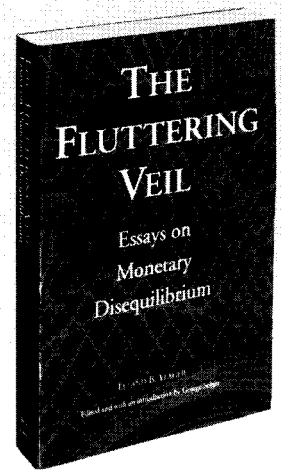
Essays on Economics and Liberty

THE FLUTTERING VEIL
ESSAYS ON MONETARY DISEQUILIBRIUM

By Leland B. Yeager
Introduction by George Selgin



Money's unique and essential role in a free market and monetary disequilibrium as the root cause of the business cycle are principles central to the work of economist Leland Yeager. For three decades he has extolled the preeminent importance of money as a source of economic fluctuations whose influence goes well beyond mere changes in interest rates or the price level. Yeager's work discloses the disruptive consequences of "monetary disequilibrium," or an imbalance of money supply and money demand. Consequently, he argues that well-designed monetary arrangements and policies are important to the success of any free-market economic system. Similarly, he insists that defects in the existing monetary arrangements in "capitalist" countries are manifestly not inherent in capitalism but are "alterable consequences" of the misguided or even mischievous interventions of government. The eighteen essays address four general topics: "Monetary Disequilibrium and Its Consequences"; "Monetary Misconceptions"; "Keynesianism and Other Diversions"; and "Avoiding Monetary Disequilibrium." In his Introduction, Professor George Selgin explains why "our understanding of the monetary foundations of a free society owes a great deal to the writings of Leland Yeager."

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Crime Control Through Private Enterprise

BRUCE L. BENSON

Israel Kirzner (1997, 62) explains that entrepreneurial discovery of opportunities gradually and systematically pushes back the boundaries of ignorance, thereby driving down costs and prices while increasing both the quantity and the quality of output. In the public-sector production of crime control, ignorance abounds, costs are high and rising, and both the quality and the quantity of the effective output of the criminal justice system clearly have room for improvement. A 1976 National Advisory Commission on Criminal Justice Standards and Goals report notes that

> this country has become the unwilling victim of a crime epidemic. The present seriousness of the disease has outstripped even the most pessimistic prognosis. Coupled with a steadily rising numerical frequency of crimes is a savage viciousness that has rendered the American public almost immune from further shock. . . .
>
> In a valiant but vain attempt to stem this massive tide of criminality, government officials, scholars, politicians, and a vast array of other professionals have responded with plans, programs, and projects all designed to reduce crime. . . . [A]lthough many of these programs were improvements over outdated practices, crime, the cost of crime, the damages from crime, and the fear of crime continued to increase.

In such circumstances, turning the entrepreneurial discovery process loose on crime control may have real advantages.

Bruce L. Benson is DeVoe Moore Professor and Distinguished Research Professor in the Department of Economics at Florida State University, Tallahassee, Florida.

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Others have also recognized that private-sector entrepreneurs can discover better ways to control crime. Perhaps surprisingly, the preceding quote from the 1976 report anticipates the suggestion made here, concluding that

> One massive resource. . . has not been tapped by governments in the fight against criminality. The private security industry. . . offers a potential for coping with crime that can not be equaled by any other remedy. . . . [T]he private security professional may be the only person in this society who has the knowledge to effectively prevent crime.

This conclusion had no noticeable impact on public policy toward crime. A 1985 National Institute of Justice (NIJ) report (Cunningham and Taylor 1985, 1–3) explains that despite continual increases in taxpayer dollars spent on the criminal justice system, "neither local, State, nor Federal resources had seriously affected the problem of crime" and that yet still "conspicuously absent from. . . crime prevention programs. . . is the input of the private security industry."

This statement is not completely accurate. Although recommendations and resources from the private security industry remain absent from most public policy programs, private citizens' own programs are relying on entrepreneurs in ever-increasing numbers in order to obtain new and innovative crime-control services (Benson 1990, 1996b). Indeed, as Lawrence Sherman (1983, 145–149) observes, "Few developments are more indicative of public concern about crime—and declining faith in the ability of public institutions to cope with it—than the burgeoning growth in private policing. . . . Rather than approving funds for more police, the voters have turned to volunteer and paid private watchers."

A typical policymaker's question is "What can government do to reduce crime?" but a better question is "What is the most cost-effective way to reduce crime?" I maintain that the answer must include a significant increase in private market provision of the four Ps of crime control: prevention, pursuit, prosecution, and punishment. To frame this argument I shall discuss examples of current markets for the four Ps, the alleged failings of such market activities in crime control, and policy alternatives to encourage more entrepreneurial discovery.

Nature and Growth of Markets in Crime Control

Market provision of goods and services to facilitate all types of crime control activities is quite substantial, but much of it is undocumented. A few surveys and studies have been conducted, however, and although some are dated, indications of the types of markets that exist and their growth can be gleaned from these sources.[1]

1. The following presentation stresses "market" responses to crime in a narrow sense (i.e., the production and sale of various goods and services to private individuals and organizations by profit-seeking entrepreneurial firms), but private-sector responses to crime, including private actions by individuals and by voluntary organizations, are actually much more widespread. See Benson (1990, 1996b).

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Private Security Personnel for Protection and Pursuit

Table 1 indicates that from 1964 to 1991, employment by private firms specializing in protective and detective services increased by 746.8 percent, and the number of firms offering such services grew by 543 percent. Entrepreneurial entry has clearly been substantial. Furthermore, the figures in table 1 do not include direct employment of private security personnel by nonsecurity firms (vertical integration), residential developments, or other institutions. A 1970 estimate put the number of privately employed security personnel, including internal security, at roughly equal to the number of public police, but by 1983, there were more than twice as many private security personnel as public police in the United States (Reichman 1987, 247). A 1991 NIJ study reports a ratio of about 2.5 private security employees to each public police officer (Cunningham, Strauchs, and Van Meter 1991). Roughly $21.7 billion was paid to 1.1 million full-time security employees in 1980 (Cunningham and Taylor 1985, 12). By

Table 1. Number of Firms and Employees in Detective Agency and Protective Services, 1964-1991

Year	Number of Firms	Number of Employees
1964	1,988	62,170
1967	3,389	151,637
1973	4,182	202,561
1976	5,841	248,050
1979	6,502	310,333
1982	8,424	345,874
1985	10,066	410,625
1988	11,675	473,308
1991	12,783	526,435
% change 1964-91	543.0	746.8
Average % change 1964-91	20.1	27.7

Source: Bureau of the Census, *County Business Patterns* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, various years).

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1991, these estimates were up to $52 billion for 1.3 million private security personnel (Cunningham, Strauchs, and Van Meter 1991), making this the second-fastest-growing industry in the United States. Even these employment figures "greatly underestimate the extent of private policing. Surveillance of private places and transactions is being conducted by actors who traditionally have not been counted as among the rank and file of private police" (Reichman 1987, 246). Examples are insurance adjusters, corporate risk managers, and other "loss consultants."

Security personnel include the stereotypical minimum-wage night watchmen, of course, but also included are fully qualified police officers (many public police moonlight as private security, and many other police officials have resigned their positions in order to enter the lucrative private-security market), and highly trained and skilled electronic-security experts. Although manufacturing firms and retailers rank first and second in contracting with security firms, government agencies rank third (M. Chaiken and J. Chaiken 1987, 3), which suggests that the government also is turning to the market to take advantage of the various cost-effective services available.

A 1972 survey found no city contracting directly with a private firm for all police services, and fewer than 1 percent dealing with private firms for subservice police functions (Fisk, Kiesling, and Muller 1978, 33). This situation has changed dramatically. Local governments now contract with private firms for a wide array of traditional police functions, particularly in the area of "police support" services, including accounting, maintenance, communications, data processing, towing illegally parked cars, fingerprinting prisoners, conducting background checks on job applicants, and directing traffic (M. Chaiken and J. Chaiken 1987, 1–3). Security firms also provide guards for public buildings, sports arenas, and other public facilities. Wackenhut Services, Inc., for example, has a number of contracts with governments. A partial list includes security for courthouses in Texas and Florida, patrols for the Miami Downtown Development Authority, guards for the Miami Metro Rail and the Tri-Rail from West Palm Beach to Dade County, complete police services for the Tampa Airport, and predeparture security for many other airports (Reynolds 1994, 11). The state of Florida contracted with Wackenhut for security guards at all its highway rest stops after a 1993 rest-stop murder of a tourist.

Wackenhut also provides the entire police force for the Energy Research and Development Administration's 1,600-square-mile Nevada nuclear test site and for the Kennedy Space Center in Florida (Poole 1978, 41–42). Several local governments have also contracted for complete police services. For instance, in 1975 Oro Valley, Arizona, arranged such a contract with the major provider of contract fire-control services, Rural/Metro Fire Department, Inc. (Gage 1982, 25). The Arizona Law Enforcement Officers Advisory Council challenged the arrangement, however, arguing that under Arizona law an employee of a private firm could not be a police officer. Rural/Metro could not bear the high court fees required to fight the challenge, so the arrangement ended in 1977. Several other similar contracts have been written elsewhere.

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Guardsmark, Inc., began providing full police services to Buffalo Creek, West Virginia, in 1976 (Poole 1978, 42). Wackenhut had contracts with three separate Florida jurisdictions in 1980 and had proposals pending with twenty communities in 1985 (Cunningham and Taylor 1985, 47). Reminderville, Ohio, contracted with Corporate Security, Inc., in 1981 (Gage 1982, 24). After the entire police force of Sussex, New Jersey, was dismissed due to a drug scandal, the community contracted with Executive Security & Investigations Services, Inc. (*New York Times*, July 13, 1993). Government contracting for all police services is, it appears, increasingly recognized as a serious alternative. In fact, this practice is quite common in certain other countries. For instance, in Switzerland one firm, Secuitas, provides police for more than thirty villages and townships (Reynolds 1994).

Specialized Products for Prevention

Security personnel are not the only privately provided source of crime prevention. A 1970 study by Predicast, Inc., estimated that sales of crime deterrence equipment grew at an annual rate of 8.8 percent from 1958 to 1963 and 11 percent from 1963 to 1968. A Research and Forecasts (1983, 68) study of fear of crime found that 52 percent of surveyed residential respondents had added extra locks to their doors, 8 percent had barred windows, approximately one-fourth of the sample had automatic timers to switch lights on and off, and many had more sophisticated devices to turn televisions or stereos on and off. Fifty-two percent also indicated that they owned a gun to protect their homes. And people do use their guns for protection. For example, California had 126 justifiable homicides by private citizens in 1981, compared to 68 by police (California Department of Justice 1981).

Similarly, sales of monitoring and detection equipment grew by 7.1 percent per year over the 1958 to 1963 period and 10.4 percent per year from 1963 to 1968 (Predicast 1970). Indeed, "alarm systems are the most frequently used component of security programs," at least for businesses, and the residential market for such services is growing rapidly (Cunningham and Taylor 1985, 21). Fifteen percent of the Research and Forecasts (1983) respondents had burglar alarms of some sort, and an estimated 10 percent of the homes in the United States were connected to central alarm systems in 1990, up from 1 percent in 1970 (Reynolds 1994, 8). Central stations for alarms are now provided by several national companies (e.g., Honeywell, Wells Fargo, Sonitrol, and Westinghouse) as well as by large numbers of small local firms (Cunningham and Taylor 1985, 21).

These equipment sales accounted for more than a third of the total expenditures on security (including spending for guard and investigative services) during the 1958 to 1968 period (41 percent in 1958 and 36 percent in 1968), and this relative level of expenditures apparently has continued to hold (Cunningham and Taylor 1985, 24). Technological advances through research and development are lowering the cost of

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such equipment while simultaneously producing ever more effective detection and monitoring, thus requiring more educated and skilled specialists in security. Therefore, both increasingly sophisticated security labor and capital combine to produce ever higher levels of security where it is demanded. A Research and Forecasts (1983, 110) survey of 1,000 large corporations found that most corporate headquarters had a "vast array" of security procedures and devices, including building security checks (88 percent), burglar alarms (66 percent), floodlighting (64 percent), automatic light timers (50 percent), closed-circuit television (48 percent), electronic card identification systems (38 percent), photoelectric timers (30 percent), and armed guards (24 percent). Four hundred of the companies used at least six of these eight security systems, and unarmed guards, plainclothes security personnel, and coded door locks were also common. Most respondents had comprehensive security programs, including employee education (73 percent), crisis management plans (63 percent), and employment of a security specialist (62 percent).

Clearly, potential entrepreneurs are discovering numerous opportunities for and new ways to provide crime-control services, and potential victims are finding the results attractive. Actual victims are also choosing not to use the public sector's criminal justice system, which suggests that private alternatives are substitutes for the public criminal justice apparatus. According to the Bureau of Justice Statistics' most recent victimization survey (BJS 1993), for instance, only about 39 percent of all Index I crimes (murder and manslaughter, sexual offenses, aggravated assault, robbery, burglary, larceny, and auto theft) were reported. Such a substitution effect arises in part from the falling relative prices of private alternatives (as quality is rising, the price per unit of effective protection appears to be falling) and from the rising costs of cooperation with police and prosecutors. Victims' costs of reporting crimes and cooperating in prosecution can include (1) out-of-pocket expenses such as transportation, baby-sitting, and parking; (2) lost wages in order to meet with police and prosecutors and appear in court; (3) emotional and psychological costs brought on by rounds of questioning, confronting an assailant, and enduring a defense attorney's questions; and conceivably (4) retaliation by an offender who is either unsuccessfully prosecuted or not confined for long (Benson 1994). Victimization surveys also indicate that the goals of revenge and incapacitation (punishment and prevention of further crimes by the offender) are the two primary reasons for reporting violent crimes to public police (BJS 1993, 34), whereas a desire to recover losses is also an important motivation for reporting property crimes. But such benefits tend to be small due to the low probabilities of arrest, prosecution, conviction, and punishment (see Benson [1996b, 1996c]), as many victims appreciate (BJS 1993, 33). In this context, many theft victims also cite insurance collection as a primary motivation for reporting (BJS 1993, 34). In other words, these crimes are reported not because victims expect the criminal justice system to produce benefits but because the victims have invested in a form of private "protection" of their wealth—insurance—and are required to file a crime report to collect.

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Thus, the extent of private protection clearly goes beyond private security, and victims also use private alternatives to resolve crimes and sanction criminals.

Private Investigation and Pursuit of Criminals

Although private investigators are not viewed favorably by most public officials, many reputable firms provide and employ such services. Insurance companies' employees investigate many crimes (i.e., if their losses are large enough to warrant investigation costs), and private firms provide similar services to some of these companies. Many other private organizations and businesses also employ private criminal investigators. The American Banking Association and the American Hotel-Motel Association both contract with the William J. Burns International Detective Agency, for example, because they do not get satisfactory results from public police (Reynolds 1994, 12).

The railroad police, established at the end of World War I as a complete and autonomous police force, have compiled a remarkable record of effectiveness, particularly relative to public police. Between the end of World War I and 1929, freight claim payments for robberies fell by 92.7 percent, from $12,726,947 to $704,262 (Wooldridge 1970, 116). This success has continued. In 1992, major railroads in the United States employed a 2,565-person security force, which cleared about 30.9 percent of the crimes reported to them. Public police cleared about 21.4 percent of reported crimes that same year, but because of the railroad police's relative effectiveness an estimated 75 percent of all crimes against railroads are reported to their police, compared to 39 percent reported to public police. Therefore, adjusted for reporting, the clearance rate for railroad police (23.2) was 286 percent higher than that for public police (8.1) (Reynolds 1994, 11–12). Furthermore, arrests by railroad police have resulted in an overall conviction rate of close to 98 percent over the years (Dewhurst 1955, 4), roughly two to six times that from public police arrests, depending on the type of crime and the jurisdiction. William Wooldridge (1970) observed that the primary reason for this success is that the railroad police specialize in one area of enforcement, developing "an expertise not realistically within the grasp of public forces" (117). Specialization and consequent proficiency (and efficiency) often characterize private security firms.

Another interesting example of private-sector pursuit is in the bail-bonding market, where the quality of the private market's output can be compared even more directly to a public-sector counterpart. Many alleged criminals must be released prior to trial, of course, due to court delay, limited jail space, and constitutional guarantees of bail. Two primary mechanisms exist for initiating release and ensuring appearance for trial. First, historically, defendants for most crimes have posted a monetary bond. Most do not have enough money to post the bonds, however, so a commercial bail bondsman posts the entire bond in exchange for a fee. Bondsmen lose the bonds if defendants fail to appear in court, so they spend a good deal of time, effort, and

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money to guarantee appearance. If a defendant flees, a national network of private "bounty hunters" is notified. Bounty hunters' incentives to find fugitives are strong because they do not get paid unless the fugitives are returned to court.

A "public bail" alternative was developed in the mid-1960s with a stated goal of helping those accused of nonviolent crimes who could not afford to post a bond. However, "it rapidly evolved into an indiscriminate release mechanism to cap the jail population. It has failed miserably to accomplish any of its aims" (Reynolds 1994, 18). The system is administered by tax-funded pretrial release (PTR) bureaucracies, and its costs are high. For instance, the Harris County, Texas, PTR program, which cost an average of $356 per defendant in 1992, had one staff employee for every 16 defendants supervised, compared to one staff person for every 87 defendants supervised by one of the county's private bail-bonding companies (19). Alleged offenders are interviewed by PTR staff, and recommendations are made to judges. Those released are freed under a "personal recognizance bond" (Monks 1986, 8). Essentially, the alleged offender simply promises the judge to appear in court when called. Failure to appear presumably means that a specified fine or forfeiture can be collected, but in general nothing is paid up front (in some cases, a defendant may be required to put up 10 percent of the specified fine or forfeiture), so these "bonds" provide weak incentives to appear (18). Such "public bail" is now widespread, and accused criminals obviously prefer it.

PTR programs tend to release the prisoners who are most likely to appear, leaving the remainder for private bail bondsmen (BJS 1990; Sorin 1986), but nonetheless, about 27 percent of defendants supervised by PTR agencies initially do not appear in court, compared to about 14 percent of those under a private bonding arrangement (Reynolds 1994; BJS 1990; Sorin 1986). Furthermore, private bail bondsmen have much lower fugitive rates. Although fugitive rates vary from year to year and depend on the time period examined, Reynolds (1994, 17) reports rates of 3 percent for private bondsmen and 9.5 percent for public PTR after one year, and less than 1 percent versus 8 percent after three years (Reynolds 1994, 17). Many urban counties have more than 50,000 fugitives from PTR, and nationally the number probably exceeds a million (19). Clearly, the private alternative appears to be more effective than the public bureaucracy. Some state legislatures have passed Uniform Bail Acts in an effort to constrain PTR agencies' discretion (e.g., they may specify that no one who has a prior criminal record or who has "jumped" a previous free recognizance bond can be released without a monetary bond). More significant, some judges refuse to deal with PTR agencies (19).

Private Punishment

Fireman's Fund Insurance Company estimates that one-third of all business failures are caused by employee theft (Cunningham and Taylor 1985, 8). Presumably, these thefts are prosecutable, but police give them little attention, as the public-sector crimi-

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nal justice system tends to be "unsympathetic to business losses due to crime" (11-12). Hence, the crime investigated most frequently by security personnel in business organizations is employee theft, and the majority of security managers for business firms report that these crimes (and most other crimes by employees) are most often totally resolved "within the organization"—close to half of all employee thefts are resolved internally; most of the rest are solved through internal investigations followed by direct contact with a public prosecutor, thus bypassing public police (11). Indeed, within business organizations, "private justice may exert far greater control on citizens than the criminal justice system itself" (12). The process may be formal, involving internal disciplinary bodies, boards, or panels (Henry 1987, 46), or informal, with confrontations and "negotiation" between security personnel or managers and accused offenders. Resulting sanctions include dismissal, suspension without pay, transfer, job reassignment or redesign to eliminate some duties, denial of subsequent advancement, and restitution agreements.

Private provision of justice can also develop outside the corporate structure. One of the earliest formal community dispute-resolution projects, run by the American Arbitration Association (AAA) in Philadelphia, began hearing minor criminal cases in 1969. During the 1970s and early 1980s, the AAA became increasingly involved in minor criminal and civil disputes, such as neighborhood fights and juvenile offenses (Poole 1978, 55). Sanctions can include restitution (money or services). This program's success provided the impetus for moving minor criminal cases into other neighborhood justice centers.

Are Criticisms of Markets in Criminal Justice Valid?

The rapid growth of market alternatives to prevent crimes and to resolve them once they are committed reflects more than simply a negative response to certain aspects of public-sector failures. Discussions of private alternatives (e.g., bail bonding, railroad police, justice internal to business firms) suggest that market providers are producing outputs superior to those of public bureaucracies. But critics of private-sector activities in criminal justice contend that by placing the emphasis on efficiency and effectiveness one tends to overlook important flaws and failings.

One common criticism is that *the profit motive leads to cost cutting and poor quality.* Private police firms presumably will reduce quality and cut corners to raise profits, for instance, as evidenced by the "undertrained," "old," "high-school dropouts" who work as security personnel *(U.S. News and World Report,* January 29, 1983).

First, the allegation is not true. Cunningham and Taylor's (1985, 89) survey found that the average age of private security personnel was between thirty-one and thirty-five, and that over half (59 percent) had at least some college education. Similarly, Edwin Donovan and William Walsh's (1986, 37-42) study of the Starrett City, New York, private security force (discussed more fully later) found that the average age of the force was thirty-nine, 83.3 percent of the officers had at least high school edu-

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cations, 70.4 percent had prior security experience before taking the Starrett City job (more than 25 percent had been either a public or military police officer), and all had received prior security training, either from another security agency or from the New York City Police Academy.

Second, the premise is not valid. The quality-cutting argument holds only when (1) sellers have short-term profit goals, or (2) the market is not competitive. Of course, in some markets con artists and hucksters move into an area for a short period, defraud a number of consumers, and move on. But no matter how uninformed consumers might be, it is unlikely that many of them would buy security services from such fly-by-night operations. A sense of permanence and a reputation for high-quality services certainly would be more important considerations for consumers than the quality-cutting argument assumes. For that reason, firms "invest" in building reputations by providing high-quality services: such investments pay off in higher long-run profits. Furthermore, the number of private protection and detective agencies in the United States probably exceeds 13,000 today, and competition is fierce. When competitive firms have long-range profit goals, their incentives are to beat the competition by offering the same service quality at lower prices (and, therefore, they must have lower costs) or superior quality at comparable prices (i.e., increased quality without increased costs). After all, profits are total revenues minus total costs, so when reducing costs and quality means losing customers and revenue, profits may fall.[2]

It would be foolish to employ a person with the training of an urban police officer as a night watchman (e.g., to check ID cards and set off an alarm in the event of trouble), and to pay the $20,000 to $40,000 it would cost to hire that person. On the other hand, to design and initiate a corporate security system, it would be foolish to hire someone who has only the training and skills of an urban police officer. "Virtually ignored [by the critics of private security] are the many thousands of well-qualified proprietary loss control personnel" (Bottom and Kostanoski 1983, 31). As already noted, increasing technological sophistication in electronic detection equipment plays an important role in the increased demand for and proficiency of skilled private security personnel. Thus, "there is emerging a new security person, highly trained, more highly educated and better able to satisfy the growing intricacies of the security profession" (Ricks, Tillett, and Van Meter 1981, 13).

Another criticism is that *without the constitutional due-process constraints that public police face, providers of private security and justice are likely to abuse their power.* "Armed and dangerous" private security officers are expected to use excessive force,

2. Critics have also raised such concerns about the quality of government services purchased under contract from the private sector, and they may be right, but not because of the profit motive subject to market forces. Here the incorruptible market regulator, competition, has been replaced with regulation by a corrupt inefficient public official, or bias has been created in the contracting process by political considerations (Benson 1994, 1996a). Markets with private-sector buyers and sellers avoid many of the pitfalls of contracting out, however, and generate more certain benefits.

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for instance, because most are disgruntled people who want to be police officers but cannot make the grade. Edward Iwata (1984, 10) implied as much when he reported that in 1983, twenty-two people in California were killed in shooting incidents involving private security personnel. Iwata failed to point out, however, that there are at least two to three times as many private security officers as public police in California and even so public police kill many more people than private security employees do. The truth is, private security personnel commit relatively little violence, which is not surprising. After all, less than 10 percent of the total private security force is armed (Cunningham and Taylor 1985, 20). Guardsmark, one of the largest national firms, estimated that only 3 percent of its uniformed personnel were armed in 1985. Security entrepreneurs report that though customers increasingly request armed guards, these requests are discouraged, both because the agencies believe weapons are generally not needed and because they face more liability and higher insurance costs when employees are armed (20).

Private police are not disgruntled rejects from the public police. Cunningham and Taylor (1985, 38-39) report, for example, that many senior public-sector law enforcement personnel are actually attracted into private security because most security directors and many security managers now earn more. Of greater significance, this extensive survey "tends to confirm other research indicating that 1) private security personnel are drawn from different labor pools than law enforcement officers, and 2) their personal characteristics are consistent with the functions they perform" (67). Similarly, table 2 shows that the fifty-four-person private police force in Starrett City was, in general, more satisfied with what they were doing than were New York City public police officers. Although security companies actively "discourage employees from detentions, searches, and the use of force" (Cunningham and Taylor 1985, 34), they apparently go much further by employing people inclined to be very "service oriented" in comparison to public police (Donovan and Walsh 1986, 49), as suggested in table 3. And this action pays off: for instance, the "concern shown by security personnel for care of property and prevention of disorder as well as the safety of residents and visitors" explains the high level of reporting (discussed later) in Starrett City (Donovan and Walsh 1986, 36).

Many individuals, whether publicly or privately employed, might abuse their positions by cutting costs, doing poor-quality work, and bullying *if they could*. Institutional arrangements within which people perform their tasks determine whether such abuses can be carried out, and competitive markets are one of the best (if not *the* best) institutional arrangements to discourage abusive, inefficient behavior. Of course, individuals not fully responsible for the consequences their actions are likely to be *relatively* unconcerned about those consequences. But private firms must satisfy customers to stay in business. Therefore, a security officer who abuses shopping-mall patrons will not remain an officer for long. Furthermore, even if a firm fails to respond to market incentives, a civil suit brought against an abusive private security firm can be

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costly, perhaps even destroying the business. In contrast, public police departments rarely go out of business, no matter how corrupt and abusive their members may be. Abuses investigated internally rarely lead to serious sanctions against public police (Benson 1988), and in a suit against a public law-enforcement agency, taxpayers pick up the tab, so the cost to the manager of that agency is relatively small. A public police officer cannot be sued even for false arrest unless the plaintiff can prove that he or she is innocent *and* that the police officer had no reason to suspect that individual. In addition, an innocent person wrongly imprisoned can make no legal claim against the government or its officials. It might be recognized that police made an error, but they have the *legal right* to make such errors and are not liable for them. Not surprisingly, tales of public police abusing suspects are common.

The primary mechanism for limiting police abuses appears to be court-imposed limitations on admitting evidence. But these "exclusionary rules" actually shackle prosecutors' ability to bring the guilty to justice (Jones 1979, 83), while the civil liberties of the *innocent* have not been protected effectively. For instance, if the police enter a home, destroying or damaging household property but finding nothing incriminating, exclusionary rules do not protect the homeowner, whose only recourse is a damage suit. Such suits are frequently unsuccessful. Public police's liability is limited by requiring that plaintiffs prove vicious intent or prior knowledge of innocence before damages will be paid (Neely 1982, 144–45). Thus, "there is little effective remedy

Table 2. Job Satisfaction: Private and Public Police

	Starrett City Security Officers (%)	New York City Police Officers (%)
Overall job satisfying	77.77	75.71
Job interesting	98.15	82.14
Feeling of helping people	81.48	79.14
Work role satisfying	93.60	88.06
Feeling of accomplishment	94.12	64.18
See results of work	88.24	47.14

Source: Donovan and Walsh (1986, 47).

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against the police available to those who are not guilty," and "for every search that produces contraband there are untold scores that do not" (Barnett 1984, 54).

Given their goal of limiting police abuse, the courts have little option but to establish exclusionary rules. Rules of evidence are under the court's control, but more efficient means of achieving the desired end are not. West Virginia Supreme Court Justice Richard Neely (1982, 162) contends that if a state legislature were to enact a comprehensive compensation system for all citizens with reasonable money damages for all unconstitutional police intrusions and simultaneously prohibit the use of exclusionary rules in the state's courts, the U.S. Supreme Court would be forced to reconsider these rules. Essentially, Neely has proposed that to eliminate exclusionary rules

Table 3. Service Orientation: Private and Public Police

	Starrett City Security Officers (%)	New York City Police Officers (%)
Enjoy assisting citizens in noncrime situations	94.34	81.62
Always comply with requests for assistance	94.44	30.60
Enjoy incidents that require investigation	84.91	92.14
Feel they receive adequate support from citizens	80.77	40.60
Feel citizens have right to complain about improper behavior by officer	98.15	91.24
Feel that citizens respect security officers	81.48	49.64
Officers with service orientation	96.30	59.57

Source: Donovan and Walsh (1986, 49).

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requires that public police be privatized, at least to the degree that they face liability rules similar to those faced by private security firms. One way to achieve this goal is to contract with private firms, which are already liable for the misbehavior of employees. As Cunningham and Taylor (1985) note, "cases brought by private security are usually well developed" (12)—not surprising given their expected liabilities if prosecution is not successful.

Another common criticism is that *only the wealthy can afford private security.* Rich and poor certainly do not have access to precisely the same private security resources. As John Lott (1987) stresses, someone who earns a high wage should be able to employ security services because that person's own time has valuable alternative uses. An array of private participatory security (e.g., crime watches and patrols), hired security, and equipment (locks, firearms, alarms, etc.) is available, so individuals can choose according to their willingness and ability to pay, with either money or time. Historical evidence suggests that with appropriate property rights structures (e.g., where victims have a transferable right to restitution), private arrangements will be made to ensure that criminals with poor victims are brought to justice (Friedman 1979; Benson 1990).

More fundamentally, the cost of the public-sector criminal justice system is disproportionately borne by the poor. The probability that a woman from a family earning under $3,000 a year will be raped is almost four times that for a woman from a family that earns $23,000 or more; the same is true for other violent crimes (Neely 1982, 140). "In terms of tax revenues," Neeley states, "the release of dangerous felons is very cheap. The cost of the sanction is then shifted [to the poor] because that is the class that disproportionately bears the brunt of crime" (140). Thus, for the poor, increasing privatization potentially means moving from a system in which they bear heavy costs toward a system that grants the protection and justice they pay for.

Market Performance

Unfortunately, unlike data on the public sector, where a penchant for keeping records makes research relatively easy, data on the effectiveness of investments in various private-sector crime prevention and protection activities are difficult to obtain and as a result have attracted relatively little attention from researchers. Donovan and Walsh (1986) performed what apparently is the only full-scale evaluation of a large private security system: the fifty-four-person force in Starrett City, a 153-acre complex in a high-crime area of Brooklyn, with fifty-six residential buildings containing 5,881 apartment units and about 20,000 racially and ethnically diverse but largely middle-income residents. Starrett City also has eight parking garages and one outdoor parking lot; a shopping center with twenty-five businesses; a recreation complex; various open spaces and parks; and one elementary, one intermediate, and two nursery schools.

Of residents surveyed, 88.8 percent felt safe within Starrett City (Donovan and Walsh 1986, 56), and this perception was clearly warranted. Table 4 lists reported

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1984 and 1985 crimes per 1,000 persons for Starrett City, for the seventy-fifth precinct, in which Starrett City is located, for New York state, and for the United States as a whole. Donovan and Walsh (1986) conclude that "Starrett City must be considered one of the safest communities in the United States" (36). (Of course, many other communities protected by private security probably compare favorably to Starrett City.) Furthermore, Starrett City's low crime rates do not reflect nonreporting. Residents are much more likely to report crimes than others in the seventy-fifth precinct, as evidenced by their reporting of many more incidents of criminal mischief, trespass, petit larceny, reckless behavior, and disorderly conduct than are reported to public police. This difference may reflect recognition that the public police and courts will do little in response to such reports, as noted earlier, but it also suggests that people have confidence private security will respond. As a result, 77.5 percent of the residents would report an assault to the Starrett City security force, but only 12.6 percent would call the New York City Police. Similarly, thirty-four of thirty-five Starrett City retailers would call Starrett security if they had a problem (the manager of a thirty-store chain with one in Starrett City, would call city police [Donovan and Walsh 1986, 75]).

Table 4. Reported Crimes per 1,000 Residents, 1984 and 1985

Crime	United States		New York State		75th Precinct		Starrett City	
	1984	1985	1984	1985	1984	1985	1984	1985
Murder/ Manslaughter	0.08	0.08	0.10	0.10	0.30	0.22	0.00	0.05
Rape	0.36	0.39	0.32	0.32	0.90	0.83	0.05	0.10
Robbery	2.05	2.14	5.07	4.56	16.00	15.51	3.60	2.57
Assault	2.90	3.20	3.66	3.86	6.10	6.88	1.90	1.05
Burglary	12.64	13.41	12.57	12.55	15.40	15.26	2.10	0.40
Larceny	27.91	30.49	27.55	28.41	12.10	11.65	2.90	1.30
Auto theft	4.37	7.27	6.51	5.90	10.10	9.51	1.80	1.10

Source: Donovan and Walsh (1986, 31).

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Beyond the Starrett City evaluation, most studies of crime control have examined the effects of public-sector efforts while ignoring potential market impacts. However, Timothy Hannan (1982) finds that the presence of guards in banks "significantly reduce[s] the risk of robbery. Accepting point estimates, the magnitude of this reduction is approximately one robbery attempt a year for those offices which would have otherwise suffered a positive number of robbery attempts" (91). More generally, Charles Clotfelter (1977, 874) considers the impact of private and public security services on the manufacturing wholesaling, finance, insurance, and real estate sectors; his empirical results "indicate that private protective firms are more effective than public police at protecting firms in these industries" (the same is true for railroads, as noted earlier). He also finds that private protection is more effective and more readily responsive in areas experiencing rapid population growth.

An individual's purchases of self-protection equipment may also be effective. Because of the controversy surrounding firearms, gun ownership has attracted more study than other forms of protection. After reviewing evidence from several sources, Gary Kleck and David Bordua (1983) conclude that

> it is a perfectly plausible hypothesis that private gun ownership currently exerts as much or more deterrent effect on criminals as do the activities of the criminal justice system. . . . [T]here is the distinct possibility that although gun ownership among the crime-prone may tend to increase crime, gun ownership among the noncriminal majority may tend to depress crime rates below the levels they otherwise would achieve. (296)

In support of this conclusion, John Lott and David Mustard (1997) find that simply allowing citizens to carry concealed weapons deters violent crimes without increasing accidental deaths. They estimate that if states that did not have right-to-carry laws in 1992 had adopted such laws, approximately 1,570 murders, 4,177 rapes, and more than 60,000 aggravated assaults would have been prevented.

Information and Discovery

Findings such as those I've discussed should not be surprising. The price system determines how resources are allocated in a private market, and these allocative decisions are typically based on better information for both demanders and suppliers than those made in the public sector. After all, buyers in private markets consume what they purchase, so they *benefit directly* from any time, effort, or expense invested in gathering information. Furthermore, they pay only for goods and services they are *persuaded* will generate sufficient benefits to cover their prices. Thus, a high price implies that relatively informed individuals think the good or service is desirable compared to the alternatives available and tells existing producers and other entrepreneurs that supplying it is desirable (profitable).

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In sharp contrast, producers of government products do not need persuasion to sell the goods or services. Consumers may decide to support candidates who promise a particular bundle of services, but then taxes are collected and specific services produced for an individual taxpayer whether that taxpayer values them at their "tax prices" or not. Consumers of government services often do attempt to inform producers of what they want, but the information transfer mechanism is crude relative to market price signals. Furthermore, if individuals invest in gathering information in order to choose the candidate promising the best bundle of government policies, they have no guarantee that the candidate will be elected or that the desired policies will be provided if the candidate is elected. (Appreciating these realities, most people do not bother to vote or get involved in other political activities.) Thus, the potential benefits of gathering information are uncertain, and as a consequence consumers of government services tend to be relatively uninformed about options. Any messages they pass to producers are, therefore, based on relatively little knowledge. Even with information, civil-service and union restrictions and political manipulations can constrain both merit rewards for innovators and punishments for inefficient, inept, or intentionally incorrect behavior. Thus, the incentives to monitor government producers and measure their performance are weak, and government officials have a great deal of discretion in allocating resources. Rationing in the public-sector criminal justice system is obviously more complicated than suggested here (see Benson [1990] or Rasmussen and Benson [1994]), but the point remains: incentives for information gathering by consumers or producers are much weaker than in private markets.

Producers and potential producers also can search for additional information and look for unfulfilled desires in order to offer a new product or service. Because private entrepreneurs reap the profits arising from such discoveries, they have strong incentives to discover relevant information in contrast with their public counterparts, the heads of various criminal justice bureaucracies. Though police chiefs, sheriffs, prosecutors, judges, and corrections officials may gain benefits (e.g., a raise, a promotion or election to higher offices, a good feeling for serving what the official perceives to be the public interest) from discovering new ways to serve citizens, consumers' lack of incentives to gather information and inability to express direct "votes" (i.e., prices) for specific products entail that innovative bureaucrats may not even be identified, let alone rewarded. Thus, discovery and innovation are much less likely in the public sector.

How Can We Encourage Greater Entrepreneurial Discovery to Control Crime?

Markets are not perfect, but even with undesirable consequences from market provision of private security and justice, government production is not necessarily justified, as government failure often is more serious. The discovery process in markets will tend

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to reduce or eliminate imperfections over time, but government failures are less likely to be alleviated and, indeed, often become increasingly severe.[3] Therefore, the following discussion suggests how to encourage even greater entrepreneurial discovery and market provision of the four Ps of crime control.

Private-Sector Crime Prevention

The number of arrests and "response times" to reported crimes are the primary "statistics" police focus on as "output" measures to justify budgets (Sherman 1983, 156). From his extensive review of research on police performance, Lawrence W. Sherman concludes that "Instead of *watching to prevent crime*, motorized police patrol [is] a process of merely *waiting to respond* to crime" in order to make arrests, and that "In general, as the level of *crime prevention watching* has declined, the level of crime has risen" (149). Considerable empirical evidence supports the hypothesis that a higher probability of arrest deters crime, of course. My argument, which is not inconsistent with this empirical result, merely suggests that waiting to make arrests is *not the most effective* way to deter crime. A growing body of evidence implies that taking police officers out of "emergency response systems" to patrol neighborhoods on foot and actively watch creates more effective crime prevention (Skolnick and Bayley 1988) and gives officers better information about the problems and people of the neighborhoods (Trojanowicz and Moore 1988).

Payments to private security personnel (and benefits for voluntary watchers) arise, in large part, from protection of persons and property, not from making arrests after crimes are committed. Thus, private security personnel provide the kind of services "community policing" advocates say public police should be providing. One implication is that public police should not be the primary providers of crime prevention (see also Sherman 1983). In this vein, security services performed by police are often identified as candidates for contracting out, including public-building security, parking enforcement, patrol of public parks, special-event security, court security, prisoner transport, and patrolling public-housing developments (Cunningham, Strauchs, and Van Meter 1991, 2). It may be appropriate to go much further. For example, the northern section of San Francisco has sixty-two "private police beats" that are "owned" by private "patrol specialists" (Dorffi 1979). All have completed police academy training and have full rights to carry firearms and make arrests. However, they are paid by the businesses, homeowners, and landlords on their "beats." Each patrol specialist purchases a beat from its previous owner and then negotiates contracts with each property

3. For discussion and rejection of other arguments against market provision of the four Ps, see Benson (1990, 271–328); for analysis of the causes and consequences of government failure in criminal justice, see Benson (1990, 43–175) and Rasmussen and Benson (1994).

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owner on the beat who wishes to purchase his or her services. The level of attention required by a customer determines the fee. In order to encourage greater use of such privatization, however, various barriers to the effective use of private policing must be eliminated. These barriers will be discussed later, but first consider the potential for private pursuit.

Private Investigation and Pursuit and the Potential Benefits of Victims' Rights to Restitution

Insurance companies and some business groups purchase investigation and pursuit services, as explained earlier, but victimized individuals have, at best, only weak incentives to pay for such services. Victimization surveys suggest that victims do not even have incentives to report most crimes to public police, let alone pay for additional investigative and pursuit services. The main reason for the lack of such incentives is that the expected personal benefits of cooperating with investigators, whether private or public, are small relative to the costs. Deterrence may be a benefit of such cooperation, but people other than the victim are likely to capture most of the benefit. However, incentives for victims to invest either time or money in pursuit and prosecution can be created by giving them property rights in restitution (Benson 1996b, 1996c).

Many states now have laws that require judges to consider restitution in sentencing decisions, but victims do not have property rights to such restitution. Indeed, restitution is generally viewed as an alternative *punishment* rather than a mechanism for making victims whole. In 1990, state courts ordered only 16 percent of convicted felons to pay restitution (Reynolds 1994, 29). More significant, the criminal justice system is either inefficient or impotent at enforcing restitution orders even when they are made (Pudlow 1993, E1). There is no hope of collecting restitution if a criminal goes to prison, given the limited use of prison-work programs (discussed later). When criminals are sentenced to probation, the supervising officers charged with collecting restitution are generally unable or unwilling to do so. Redirecting criminal justice by establishing a restitution-based rather than a punishment-based system would create stronger incentives for victims to report crimes and cooperate in pursuit and prosecution. Victims also could offer portions of their restitution as rewards to private entrepreneurs (indeed, restitution should cover the costs arising from prosecuting the crime as well as appropriate damages [Benson 1996c]). Specialized firms (bounty hunters) would then arise to pursue *criminals* and collect fines. Alternatively, if the right to restitution were transferable (Friedman 1979), a victim might simply sell the right to collect a particular fine to a firm that pursues the offender and recovers the debt. Indeed, if restitution were a transferable property right, entrepreneurs would be likely to offer "victim insurance" wherein victims are immediately compensated and the insurance company then pursues the criminal in order to collect the payments.

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Legal Barriers to Private Pursuit and Prosecution

Statutes in many states mandate that private citizens, including those employed in security and investigative services, cannot take people into custody, let alone gather evidence for trial or cite suspects in court. Some governments grant private security personnel either full or limited "police powers" within confined areas, however, such as the San Francisco police beats. In New York, security personnel in retail establishments can act as agents of their employers and apprehend suspects, cite the suspects in court, and preserve evidence if they have completed an approved course of training. Other states grant similar powers to security personnel in plants, stores, campuses, or retail malls. In a survey of private security managers, only 29 percent report having some special police powers (Cunningham and Taylor 1985, 16). In order to encourage more investigation and pursuit by private security, "police powers" should be granted under many more circumstances.

Licensing and regulatory restrictions may appear to be desirable mechanisms for protecting citizens from inferior services by unqualified personnel, but licensing often creates a barrier to entry, preventing competition (Stigler 1971), and competition is generally a more effective regulator than government. Indeed, security managers, who usually favor state licensing (probably in part because it provides a signal of reliability to uninformed consumers, but also perhaps because it can limit competitive entry to challenge established firms) recognize that licensing and regulatory boards dominated by industry representatives "lead to a limitation on competition, through the enactment of provisions that only certain firms could meet" (Cunningham and Taylor 1985, 28).

Private security firms are increasingly seen as a threat to police budgets and job security (Cunningham and Taylor 1985, 43). Nonetheless, of the thirty-five states that required licensing of guard and patrol firms in 1985, fifteen conducted regulation through the State Police or Department of Public Safety (28), seven through a Department of Commerce or occupational licensing agency, and five through the Department of State. Not surprisingly, "[O]f these mechanisms, the regulation by law enforcement agencies appears to be the least popular. . . . [S]ecurity firms generally oppose the practice. . . . [It] has led to unfair and counterproductive controls, such as an overemphasis on police training in the curriculum for security guards" (28–29). When police are in charge of regulation, the predictable result is limits on competition through unnecessarily strict regulations and licensing requirements. If regulation and licensing are desirable, some agency other than the police should perform them.

Local ordinances and licensing of security firms appear to be more troubling than state regulations. For one thing, differing requirements across jurisdictions can create barriers to successful security operations, raising the costs of firms serving regional clients, preventing the pursuit of suspects across jurisdictions, preventing testimony, and so forth. An NIJ study recommends that there should even be "regulation and

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licensing reciprocity between states" in order to overcome barriers to serving multistate clients, as well as other costs that arise because of varying requirements and limitations on powers across states (Cunningham, Strauchs, and Van Meter 1991, 4). Also, these local regulations are more likely to be controlled or easily manipulated by public police interests. About one-third of the law enforcement agencies surveyed by Cunningham and Taylor (1985) had the power to suspend or revoke private security licenses, and law enforcement executives strongly advocate more widespread use of city and county ordinances granting them such powers. The 1991 report for NIJ (Cunningham, Strauchs, and Van Meter 1991, 4), however, concludes that any licensing and regulation should proceed "through state, not local" authorities. If licensing is to be done, this recommendation should be followed, but there are alternatives. One reason for worrying about the quality of private security and therefore one alleged justification for regulation is that security personnel may be criminals. However, this condition arises because security firms are generally denied access to criminal records of job applicants. Both the 1985 (Cunningham and Taylor 1985, 65) and 1991 (Cunningham, Strauchs, and Van Meter 1991, 4) NIJ reports recommend that all security employers have access to criminal records in order to screen their applicants. This change would reduce the need for regulatory oversight. Because private firms are generally liable for the actions of their employees, entrepreneurs have stronger incentives to carefully screen applicants than public officials do. In fact, security firms often obtain applicants' criminal records "illegally," so the recommended change would legalize what many firms already feel compelled to do in order to provide high-quality services.

Private Prosecution

Every accused criminal is guaranteed counsel, but though the public prosecutor supposedly represents victims, there are far too many victims for prosecutors to represent them all effectively. Prosecutors must plea-bargain away victims' charges or simply drop charges for many of the criminals they face. Why not allow private prosecution? After all, history tells us that private prosecution can work. Indeed, it was the norm in England until this century (Cardenas 1986). Of course, an important question is: How would a private citizen finance the prosecution of a criminal? One possibility is a voucher system such as the one suggested by Stephen Schulhofer and David Friedman (1993) for privatizing indigent defense and eliminating the public-defender bureaucracy (another attractive candidate for privatization). A superior way to pay for private prosecution (and one that simultaneously creates incentives to pursue prosecution) is the refocusing of the criminal justice system on restitution suggested earlier, including repayment of the costs of collection (e.g., prosecution and supervision of payment). Effectively, this procedure turns crimes with victims into torts, creating strong incentives to pursue prosecution in order to collect damages (Benson 1990, 349–78, 1996c). This is not a far-fetched idea. For instance, in France, a crime victim can file a civil

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claim against the accused, and it can be filed in the criminal proceedings. Furthermore, if a judge in France finds a claim to be groundless, the accuser pays the court costs and damages to the accused, and if the accusation is believed intentionally false, charges can be brought against the accuser (Cardenas 1986, 386). This procedure should be adopted in the United States for criminal law (and, indeed, for tort cases in general), even when a police officer is the accuser.

Other countries also allow some private prosecution. In England, victims perform about 3 percent of criminal prosecutions (Cardenas 1986). Germany, like the United States, has created a virtual public monopoly over prosecution, but Germany has two exceptions that do not exist here (Reynolds 1994, 27). First, a class of misdemeanors, including violations such as domestic trespass, can be prosecuted by victims. Second, a crime victim can demand that the public prosecutor pursue a case, and if the demand is refused, the victim can appeal to the court. If the court orders prosecution, the victim can act as a "supplementary prosecutor" to ensure that the public prosecutor adequately presents the case. In Japan, mediation between the accused and the victim occurs before the formal criminal trial, and if the accused admits guilt and pays appropriate restitution the victim writes a letter to the judge that reduces or eliminates punishment (Benson 1996c).

Informally, sanctions are being imposed within business firms and by various other groups of private citizens, as noted earlier, thus reducing the demands on public courts and perhaps the need to dismiss or plea-bargain so many cases. Civil liberty concerns about private judges mandating punishment will probably prevent the development of formal private-sector criminal courts, even though civil dispute resolution has been shifting into private forums for some time. Commercial arbitration began in the American colonies and has grown in importance almost continually since then (Benson 1995, 1997). Labor and consumer arbitration also have a long and well-documented history (Benson 1997).

Furthermore, a significant entrepreneurial innovation has developed and spread over the last two decades, creating a new industry. In 1976, California had a 70,000-case public court backlog, with a median pretrial delay of 50.5 months (Poole 1980, 2). Two lawyers who wanted a complex case settled quickly found a retired judge with expertise in the area of the dispute, paid him at attorney's-fee rates to resolve it, and saved their clients a tremendous amount of time and expense (Granelli 1981, 1–2). This idea was quickly imitated and improved upon. The first private for-profit firm offering trials, Judicial Arbitration and Mediation Services Company (JAMS), was started in 1979 by a retired California state trial judge. It has become the largest firm in a rapidly expanding market, with gross revenue growth of 826 percent from 1988 to 1992 (Phalon 1992, 126). More than fifty firms are now active in this market and have moved from business disputes into personal injuries, divorces, warranty disputes, loan defaults, and other areas.

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Formal private courts could move into criminal justice quickly if the system were refocused on restitution, making the issue one of determining damage payments rather than punishment, at least for most crimes. Deciding damage awards is, after all, a frequent function of private civil courts. Furthermore, as explained later, restitution decisions are likely to involve contracts specifying debts and their terms of payment—an issue regularly handled by private mediators and arbitrators. Under a restitution system, the number of available courts could expand dramatically, reducing the need for plea and charge bargaining as they are currently practiced. Bargaining and pretrial settlement might still be important, but they would take place between criminals and victims, facilitated perhaps by a private mediator, as in Japan (Benson 1996c).

Private Punishment

Almost every aspect of corrections in publicly run facilities, including food services, counseling, industrial programs, maintenance, security, education, and vocational training, is under contract with private firms on a piecemeal basis (Logan and Rausch 1985, 307). In addition, contracting out for provision and management of entire correctional facilities is common. The Federal Bureau of Prisons contracts out all of its halfway-house operations (Poole 1983, 1). In 1985, thirty-two states also had nonsecure, community-based facilities (e.g., halfway houses, group homes, community treatment centers) under contract (Mullen, Chabotar, and Carrow, 1985, 56–68). In that same year, approximately 34,080 juvenile offenders were held in nearly 1,996 privately run facilities nationwide. The first privately operated high-security institution in recent history was an intensive-treatment unit for juveniles at Weaverville, Pennsylvania, that RCA began running in 1975; by 1983, there were seventy-three privately provided secure juvenile facilities (Logan and Rausch 1985, 307). No privatized secure adult facilities existed yet in 1980, and indeed, no jurisdiction other than perhaps the federal government had express legal authority to contract for such a facility. By the end of 1994, however, about one-half of the states had legislation establishing such legal authority, and all three federal agencies that run prisons had the clear authority to contract out. Privatization of major adult detention facilities began in the early 1980s, when Behavioral Systems Southwest provided a minimum-security Immigration and Naturalization Service prison (Fixler 1984, 2). This market is expanding rapidly. Corrections Corporation of America, Inc. (CCA), formed in 1983 and now the largest private supplier of secure adult facilities, received a contract from New Mexico to design, finance, construct, and operate a prison for all of the state's female felons, becoming the first private minimum-through-maximum-security state prison in recent history. In 1994, twenty-one different firms shared eighty contracts for adult prisons with 49,154 total beds ("Privatization Census" 1995, 1).

The potential gains from contracting out for prisons clearly have not been exhausted. The relatively limited use of contract prisons reflects government barriers

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rather than a lack of suppliers. For instance, Tennessee lawmakers turned down CCA's offer to take over the state's entire prison system, despite the prospect of substantial cost savings. Various states put tighter budgetary or operating restrictions on private prisons than on those built and operated by public agencies. These laws shelter state-run facilities and their employees from competition. After all, a major source of political resistance to contracting out for prisons is organized correctional officers (Benson 1990, 334).

Imprisonment is only one form of punishment, of course, and many of the alternatives are also contracted out (e.g., drug treatment programs). However, two large pools of criminals are supervised almost exclusively by public employees: those on general probation and on parole. And "to say that there are problems with both the probation and parole systems is putting it mildly" (Reynolds 1994, 30). Although parole and probation supervision has not been privatized, it easily could be, using the commercial bail system as a model (31). Criminals eligible for probation or parole could be required to post a financial bond, obtained for the most part from private bondsmen for a fee, against specified violations of their release conditions. Such a private financial market would provide valuable information for the courts and parole boards: if a convicted felon is too risky to bond, then, as Reynolds suggests, "why should the general public risk having that person on the street" (31)?

Paying the Cost through Private Labor Markets

During the nineteenth century, many state prisons financed their own operations by selling prison labor or its products, even turning over surplus funds to state treasuries (Reynolds 1994, 33). Today, the prison population represents a huge pool of almost completely unused labor that simply drains state treasuries rather than contributing to them. Why? One answer may be revulsion against the inhumane treatment of prisoners in the historical state-run, prison-work programs. However, criminals can be protected against such abuses by having a choice between a specified prison term in a conventional state facility (or contract prison) and voluntarily being supervised while working off a specified fine. Competing firms could offer contracts that specify the work conditions and wages, and perhaps the portions of the wages going to pay off the fine, to "room and board," and to the prisoners' families (thereby reducing the welfare burden of the state as well). If a firm does not live up to the contractual promise, modern contract law could be brought to bear, and the inmate could collect damages. In addition to contract law, competitive forces would work to preclude inhumane treatment of prisoners as a firm with a reputation for abuses clearly would not attract voluntary contracts from prison laborers.

Would criminals voluntarily contract to work off their "debt"? Consider the results of a very limited prison-work experiment. At the Maine State Prison, inmates were given access to the prison's shop equipment to produce novelties. Other prisons

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have done the same thing, but Maine has a strong market for novelties because the prison is located on a major tourist route. In addition, Maine inmates were allowed to employ one another, which permitted efficiency-enhancing specialization and division of labor, and beginning in 1976 prisoners were allowed to "patent" their novelty designs, so they had incentives to innovate and expand their production. A "miniature economy" developed inside the prison, with two-thirds of the inmates acting as employers, employees, or both, even though prisoners could not use dollars for their labor-market transactions (they used coupons that could be spent in the prison's canteen or banked in the prison's business office [Shedd 1982]). Clearly, prisoners will work voluntarily if incentives to do so exist, as they would if a prisoner could work off a predetermined fine. In fact, the sentence would have a self-determinative nature in that the harder a prisoner works, the faster he or she can obtain release (Barnett 1977, 294). The resulting incentives could also have significant rehabilitative impacts (Barnett 1977, 293; Shedd 1982, 24). John Sneed (1977) argues that "the convict will have a direct incentive to exhibit good behavior. The better risk he appears to the penal agency, the more likely he is to be allowed parole or other freedoms in the interest of increasing his productivity" (123).

Political and bureaucratic resistance to prison-work programs provides the major barriers to their development. For example, despite the Maine Novelties program's significant benefits, on April 16, 1980, a lockdown of the Maine State Prison began. An extensive search and seizure operation destroyed the prisoners' businesses. After the lockdown, substantial reductions in economic rights and incentives were implemented that destroyed any potential for reviving the program. Why? For several years the Maine Corrections Bureau had tried unsuccessfully to obtain larger budgets and to have the bureau elevated to cabinet level. Following the lockdown, budget increases were approved, and the Bureau of Corrections was elevated to cabinet-level status. Key legislators switched their position on both issues because of the lockdown. Another factor was bureaucratic rigidity and resistance to change. Prison authorities wanted complete control over prisoners, not "ambitious and talented individuals finding a way around bureaucratic restrictions on their activities" (Shedd 1982, 9).

In most states, political pressure by business to eliminate competition resulted in laws or constitutional provisions that prevented the sale of all but a few prison-made items (e.g., license plates). In 1935, under pressure from business and labor unions, Congress prohibited interstate commerce in prison-made products when the receiving state had laws against the marketing of such goods. In 1936 private contractors were prohibited from using prison labor to meet government contracts exceeding $10,000. Then in 1940, transportation of prison-made goods across state borders was made a federal offense, regardless of state laws. "The effect of all these statutes was virtually to wipe out the market for prisoner labor and for prisoner-made goods" (Shedd 1982, 27–28). Prison-work programs were further undermined in the 1950s and 1960s "with

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the ascendancy of the correctional treatment model" (Auerbach and others 1988, 1). Rehabilitation was thought to be more directly achievable through education, vocational training, and counseling programs than through work. However, in the face of soaring prison costs and increasing prison populations that are placing greater pressures on prison administration to reduce idleness, both state and federal laws have begun to change. The growing belief that the correctional treatment model of the 1950s and 1960s has failed and that life in prison is too "soft" also adds to political support for prison work (9). In 1979, Congress removed the federal restrictions on the interstate sale of prison-made goods, provided that (1) inmates working in private prison industries are paid at a rate equal to or greater than the rate paid locally for similar work; (2) local unions are consulted before the project is initiated; and (3) no employed workers outside the prison are displaced, the prison work does not involve an occupation for which there is a local surplus of labor, and existing contracts for services are not impaired (10–11). This legislation also authorized up to an 80 percent deduction of the participating workers' gross wages for taxes, room and board, family support, and state-run victim compensation programs. Between 1979 and 1988, more than half of the states also passed legislation authorizing private-sector involvement in prison-work programs (11–13). With the development of the various federal experimental programs as well as several state and county programs, evidence is mounting that prison-work programs can be developed to the satisfaction of both prisoners and public officials (25–39). In South Carolina, for example, prisoners in the start-up phase of two private-sector programs had earned $2.4 million in wages by the end of 1992, with about $500,000 going to taxes, $119,000 to victim compensation, $322,000 to room and board, $364,000 to family support, and $1.1 million to inmate savings accounts (Reynolds 1994, 34).

Restitution versus Punishment

Robert Poole (1980) describes a decision reached in an experimental restitution program:

> When "Fred Stone" broke into the Tucson house and stole the color TV, he had little idea that he would be caught. Still less did he expect to be confronted face-to-face by the victim, in the county prosecutor's office. In the course of the meeting, Stone learned that the TV set was the center of the elderly, invalid woman's life. With the approval of the Pima County, Arizona, prosecutor, he agreed not only to return the TV, but also to paint her house, mow her lawn, and drive her to the doctor for her weekly checkup. By doing so he avoided a jail sentence, and saved Tucson area taxpayers several thousand dollars. (1)

Poole makes three important points. First, even though sanctioned by public prosecu-

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tors and courts, some restitution programs have found it desirable to mediate private restitution contracts between the offender and the victim (Poole 1977, 1; Anderson 1983). Thus, the prosecutor and court become an arbitrator-mediator, clearly a role that can be played by private courts. Second, restitution need not be monetary. One criticism of monetary fines is that criminals may be judgment proof because they are unable to pay a fine large enough to either compensate the victim or be an effective deterrent. However, criminals should be allowed to work off their restitution, either by working directly for the victim or by selling labor, perhaps under contract in a prison environment. "Community service" sentences seem to be popular in many states today for various misdemeanors and minor felonies. Why not implement "victim service" sentences? Third, restitution is a relatively efficient form of punishment (Friedman 1979, 408; Barnett 1977, 29). Imprisonment wastes large amounts of resources in the form of idle prisoners' time. Even if close supervision in prison-work programs is required to ensure restitution payments, prisoners are working to produce goods for sale rather than being idle.

Refocusing the criminal justice system to emphasize restitution means that the restitution payment process can be specified contractually. If a victim perceives a risk of reneging, a private "collection" agency can be employed to supervise the contract, providing the necessary monitoring and security to ensure that payments are made. This arrangement is not very different from a restitution program called EARN-IT, in Quincy County, Massachusetts, where forty local businesses provide jobs to offenders unable to find jobs elsewhere (Anderson 1983, 27). The employers act as supervisors during work hours, and the offenders report to probation officers. In other experimental restitution programs, offenders return to jail or a halfway house at night (recall that most halfway houses are contracted out, and the same private entity could also collect and distribute restitution payments). If the risk of reneging is large enough, private firms employing prison labor can serve as collection agencies. Indeed, such a firm might pay a bond to the victim equal to the discounted value of the anticipated restitution and then collect the payments itself in order to recover the bond plus costs and interest.

For the imposition of punishment, as for increasing the probability of pursuit and successful prosecution, refocusing criminal justice on restitution for victims will create many more opportunities for entrepreneurial discovery. In fact, the full potential for private provision of the four Ps cannot be achieved, or probably even envisioned, without a reorientation of criminal justice toward concern for victims, who should be the most important "customers" in the market for justice.

Conclusions

Many options to encourage entrepreneurial discovery have been discussed. If governments do not follow at least some of these recommendations, increased private protec-

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tion, pursuit, prosecution, and punishment will occur to a large degree anyway (Benson 1990, 1996b). After all, the growth in private security and private justice I have discussed has occurred in spite of the legal barriers that are the focus of several of the recommendations made here. Legal barriers can prevent some cost-effective improvements (private markets for criminal labor, formal private prosecution and courts, and others), and they can slow the process of discovery, even diverting its evolutionary path, perhaps in undesirable ways (e.g., creating incentives for the secretive application of destructive or violent private justice), but it is too late to halt the process. Therefore, as an alternative, criminal justice policymakers should seriously consider supporting and even encouraging free and open entrepreneurial discovery, thereby perhaps influencing some of the inevitable developments.

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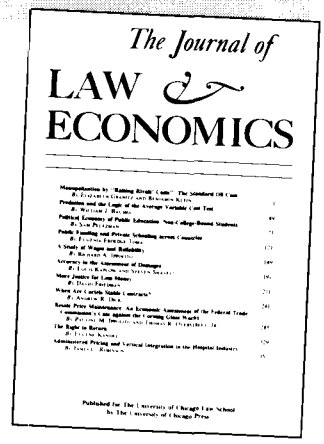

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Medicare's Progeny:

The 1996 Health Care Legislation

CHARLOTTE TWIGHT

On August 1 and 2, 1996, Congress cleared for the president's signature the Health Insurance Portability and Accountability Act of 1996, known in the press as the Kennedy-Kassebaum bill. There was little dissent: the House vote approving the conference report on the bill was 421 to 2, the Senate vote 98 to 0. The press response was muted but unquestioningly favorable. After all, this bill was said to bring about health insurance "portability" and "accountability." President Clinton signed the bill into law on August 21, 1996.[1]

Unbeknownst to most Americans, the 1996 act contained major provisions of the Clinton administration's previously rejected 1993 Health Security Act. How did some of the most feared provisions of the 1993 proposal—potentially threatening innocent physicians with federal criminal penalties and jeopardizing the privacy of doctor-patient relations through a nationwide electronic database—become law in 1996 virtually without opposition? The remarkable truth is that the political strategies that facilitated passage of this bill are the same as those that allowed the original Medicare law to be passed in 1965 after decades of public rejection of federal health insurance measures. In both cases advocates achieved their goals by manipulating political transaction costs to deflect and silence public opposition.

1. Health Insurance Portability and Accountability Act of 1996, Public Law 104–191 (August 21, 1996). This bill was agreed to by the House-Senate conference committee appointed following passage of differing bills by the two chambers: the House of Representatives had passed H.R. 3103, the Health Coverage Availability and Affordability Act of 1996, on March 28, 1996 (267 to 151); the Senate had amended the House bill with substitute language passed as S. 1028, the Health Insurance Reform Act of 1996, on April 23, 1996 (100 to 0).

Charlotte Twight is a professor of economics at Boise State University.

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Imagine a well-publicized congressional vote on a widely understood single issue: whether to mandate creation of a uniform national electronic database requiring the recording and transmission of personal health information revealed by private individuals to their doctors, with no privacy protection required to be put in place for three and a half years. That one cannot imagine passage of such a measure highlights the importance of transaction-cost manipulation in facilitating and sustaining government encroachments on what people long regarded as inviolable rights. Congress in 1996 passed exactly such a privacy-threatening database law—but not as a stand-alone measure and without either publicity or public understanding of its substance. The trick used by proponents of such measures is to raise the transaction costs to voters (and to congressmen) of resistance—a trick performed as ably in 1996 with the Health Insurance Portability and Accountability Act as in 1965 with the Medicare legislation. In both cases transaction-cost-increasing political strategies such as tying, incrementalism, and misrepresentation were used to establish new governmental powers whose implementation in turn would raise the transaction costs to citizens of resisting this expanded federal authority.

I shall consider the 1965 Medicare legislation and the 1996 Health Insurance Portability and Accountability Act as linked case studies of the accretion of federal power over U.S. health care. The facts of the individual cases and the theory linking them reveal a political process of greater regularity and generalizability than a consideration of either law in isolation would suggest. Readers concerned about the future of freedom may find my conclusions disturbing. Advocates of expanded federal authority persist, and manipulation of political transaction costs combined with induced ideological change allows them to work their will in the longest of long runs.

A Theory of Institutional Change

For many years I have worked to develop and test a theory of government manipulation of constitutional-level transaction costs (Twight 1983, 1988, 1994). That theory will serve as a backdrop for the analysis of health-care legislation that follows. Although it would be inappropriate to reiterate the full theory here, some definitions and a brief summary will be useful.

I define constitutional-level transaction costs as the costs to individuals of negotiating and enforcing collective political agreements that influence the scope of government authority—the line dividing what is handled by government from what is regarded as outside its purview. Constitutional-level political transaction costs so defined encompass both costs of *perceiving* relevant political information (information costs) and costs of *acting* on those perceptions (which I term "agreement and enforcement costs").[2]

Animating the theory is the idea that government officials as individuals often have both the incentive and the capacity to manipulate the political transaction costs facing private citizens (and each other) so as to achieve more of what officeholders

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want with less resistance from the public. This quest often involves transaction-cost augmentation—artificially increasing the costs to private citizens of resisting authority-changing measures favored by particular officeholders. The motive for this behavior is readily understandable: if government officials can increase the marginal costs to voters of understanding or taking political action to oppose a measure that changes the scope of government authority, they can reduce political resistance. For example, officeholders may mitigate resistance by misrepresenting a bill's contents, using incremental strategies, tying controversial measures to popular ones, using tax strategies that obscure a program's cost, and the like. The theory strongly rejects the supposition that government always functions to minimize politically relevant transaction costs.

Artificially increased political transaction costs thus drive a wedge between voter preferences and political action that reflects those preferences. The theory identifies various determinants influencing an individual officeholder's decision to favor a transaction-cost-increasing measure: executive and party support for the measure, impact on officeholder job security and perquisites, third-party payoffs, officeholder ideology, the measure's complexity and perceived importance to constituents, publicity, time, and the existence of an appealing rationale for the measure (Twight 1983, 1988).

Once in place, institutional changes that increase the public's transaction costs of resisting expanded federal authority set in motion a process of accommodative ideological change that further lessens the likelihood of restoring the status quo ante (Higgs 1985, 1987; Kuran 1995). Twentieth-century U.S. politics has supplied countless examples of government manipulation of constitutional-level transaction costs fostering institutional changes followed by sympathetic ideological change. The legislative histories of Social Security, income-tax withholding, public education, and other government-expanding measures have proved consistent with this interpretation (Twight 1993, 1995, 1996). What about Medicare?

Medicare's Passage in 1965: Tactical Blueprint for 1996

Medicare did not emerge spontaneously in 1965.[3] Its passage had been sought continuously since 1934 by a group of advocates within the federal government. For three full decades the concept of compulsory national health insurance had been rejected, year after year, by Congress and the public (Twight 1997). Of interest here are the strategies proponents employed to overcome this demonstrated public opposition.

National health insurance first appeared on the federal government's agenda in a serious way in 1934,[4] when President Franklin Roosevelt established the Committee on Economic Security (CES) and charged its members with formulating recommendations for a social security bill. Included in their initial recommendations, with

2. The phrase "political transaction costs" also is used to denote these constitutional-level transaction costs.

3. I analyze the history of Medicare in greater detail in Twight (1997).

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Roosevelt's approval, was a provision for the study of national health insurance. That provision caused such resistance that President Roosevelt successfully sought its removal from the resultant bill in order to secure passage of the Social Security Act of 1935 (Corning 1969, 38; Chapman and Talmadge 1970, 342).

Nonetheless, the president and the Social Security Board proceeded as if the original statutory language had been retained. The day after the Social Security Act was signed, Roosevelt appointed the Interdepartmental Committee to Coordinate Health and Welfare Activities to consider health insurance. That committee created the Technical Committee on Medical Care, whose 1938 report led to the "climate-building" National Health Conference and Interdepartmental Committee recommendations that included, inter alia, a "general program of medical care, paid for either through general taxation or social insurance contributions" (Poen 1979, 19).

Thereafter, bills on this subject were introduced in virtually every session of Congress. Beginning in 1943, the Wagner-Murray-Dingell bills sponsored by Senator Robert Wagner (D.-N.Y.), Senator James Murray (D.-Mont.), and Representative John Dingell (D.-Mich.) explicitly proposed universal compulsory national health insurance. Advocates from the Social Security Board often drafted the bills and cajoled willing legislators into introducing them. These executive-branch officials' names echo across the pages of thirty years of legislative history: Isidore Falk, Wilbur Cohen, and Robert Ball, among others. Though their positions changed when reorganizations occurred and when inclement political conditions arose, they were never far from the drafting of the bills. Throughout this period, government officials tried hard to change public opinion on this topic (surveys in 1942 showed 76.3 percent of the public opposed to government provision of free medical care), in one case successfully intervening prior to publication to persuade the authors of a *Fortune* magazine article to change their conclusions regarding the Wagner-Murray-Dingell bill (Poen 1979, 45; Cantril 1951, 440). Martha Derthick (1979, 317) remarked that "Nowhere is the aggressiveness of social security program executives better demonstrated than in these early campaigns for national health insurance."

Deliberate reliance on incremental strategies began in earnest in 1951. It was a turning point. After discouraging results for advocates of compulsory national health insurance in the 1950 elections, program executives including Social Security officials Cohen and Falk realized that they could not succeed with a *universal* compulsory health insurance plan. As a result, in the spring of 1951 they began to work for a narrower program specifically targeted at the elderly. Such bills were introduced repeatedly throughout the Eisenhower years, as advocates tried to keep the idea alive.

4. For discussion of the history of the federal government's treatment of health-care issues in the United States from 1793 forward, see Chapman and Talmadge (1970). See Wasley (1992, 49-50, 55-58) for discussion of the federal government's role in stimulating employer-provided, first-dollar-coverage health care and in shaping the health-insurance market.

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In 1956, in a political development that Derthick (1979, 319) regarded as a "necessary prelude" to Medicare, a statute providing disability coverage was passed, whereupon the AFL-CIO recommitted itself to the fight for compulsory national health insurance. Along with Cohen, Falk, and Ball, Nelson Cruikshank (head of the AFL-CIO's Department of Social Security) spearheaded the drafting of a bill proposing hospital, surgical, and nursing-home benefits for social security recipients. Their bill became the Forand bill, introduced by Aime J. Forand (D.-R.I.) but rejected by the House Ways and Means Committee in 1959. In 1960, in an effort to forestall more comprehensive legislation, House Ways and Means Committee chairman Wilbur Mills (D.-Ark.) and Senator Robert Kerr (D.-Okla.) introduced and secured passage of the Kerr-Mills program of needs-based medical assistance for the aged.

This preemptive effort failed to stem the tide. In 1961 and again in 1963 Representative Cecil King (D.-Calif.) and Senator Clinton Anderson (D.-N.M.) introduced another bill patterned on the Forand bill. When the landslide election of President Lyndon Johnson changed the political calculus in 1964, the King-Anderson bill became the basis for the administration's health-care proposals, H.R. 1 and S. 1.

Incrementalism in its various forms—including the decision to target the elderly in the belief that they represented the most sympathetic group—was a deliberate and sustained strategy that increased the costs to the public of resisting compulsory national health insurance. After the 1964 elections, when for the first time all of the determinants discussed earlier favored pro-Medicare transaction-cost augmentation, Congress used additional transaction-cost-increasing strategies to pass and entrench the Medicare bill (Twight 1997).

First, the Medicare bill was included within—and tied to—the Social Security Amendments of 1965. Chief among the politically irresistible features of the broader package was a 7 percent across-the-board increase in social security cash benefits—not to mention maternal and child-health services and the like. To vote against Medicare, a legislator had to vote against that 7 percent social security benefit increase, made retroactive to January 1, 1965. Congressmen in a 1964 conference deadlocked on the Medicare issue had decided to forgo a Social Security benefit increase agreed to by both houses of Congress in order to permit this tie-in and thereby give Medicare another chance in 1965 (Twight 1997).

Some legislators objected to the linkage. Representative John Byrnes (R.-Wisc.) decried the fact that Medicare's "proponents are unwilling to let [it] stand on its own feet and rise or fall on its own merits," instead choosing to "tie [it] to the now controversial amendments to the Social Security Act" (*Cong. Rec.*, House, April 7, 1965, 7220). Representative Delbert Latta (R.-Ohio) asked his colleagues "why the administration and the Medicare backers were afraid to let this so-called Medicare part of this bill come to the floor of the House by itself . . . and be voted up or down on its own merits. What were they afraid of?" (*Cong. Rec.*, House, April 8, 1965, 7420). When the Senate vote drew near, Senator Milward L. Simpson (R.-Wyo.)

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spoke bluntly about his personal unwillingness to succumb to the incentives created by the tie-in: "I choose not to prostitute my vote in this matter and because portions of this bill are objectionable to me, I am compelled to vote against the total bill, even though I support parts of it" (*Cong. Rec.*, Senate, July 8, 1965, 15874). In the end, however, most did succumb.

Second, legislators and others in government misrepresented the Medicare bill's contents. Although private citizens were led to believe that Medicare was designed in part to avoid the financial devastation associated with extended illness in old age, catastrophic illness was not covered by the bill. As originally introduced in 1965, H.R. 1 and S. 1 covered only sixty days of hospital care, sixty days of nursing-home care, and some laboratory and X-ray services. Senator Russell Long (D.-La.) challenged Department of Health, Education, and Welfare (HEW) Secretary Anthony Celebrezze for his duplicity on this point, stating, "Well, in arguing for your plan you say let's not strip poor old grandma of the last dress she has and of her home and what little resources she has and you bring us a plan that does exactly that unless she gets well in 60 days" (U.S. Senate 1965, 183). Ordinary physicians' visits, therapeutic drugs, and the like were not covered by H.R. 1 and S. 1. Nonetheless, the public widely believed that the proposal represented comprehensive coverage of all medical needs of the elderly as suggested by use of the term "Medicare," a label originally applied to a comprehensive medical program for military dependents.

There were other misrepresentations as well. To counter the public's fear that Medicare would allow government control over the provision of medical care, government proponents of Medicare included a provision in the bill specifically disavowing such control. The disavowal was a charade. As Representative Thomas Curtis (R.-Mo.) remarked, "If you look at the bill, right at the very beginning there is a great big label. . . . It says there will be no Federal interference, and that free choice by the patient is guaranteed. Then the next 70 pages tell you how the Federal interference will be carried out" (*Cong. Rec.*, House, April 7, 1965, 7231). Nonetheless, the statutory language made it more difficult for the public to understand that control was inevitable if government was empowered to determine and pay "reasonable" charges for medical services.

In addition, legislators and program executives falsely represented the Medicare bill as a way to "avoid dependence" in old age. As already noted, the omission of coverage for catastrophic illness guaranteed that the elderly would not be protected against this most feared condition. More important politically, the appeal of "avoiding dependence" put a favorable gloss on an unspoken rationale for much public support for Medicare—the desire of adult children to avoid responsibility for their aging parents' medical bills.

Other transaction-cost-increasing strategies involved cost concealment associated with Medicare's financing. Because the program was to be financed through the payroll tax, employer withholding of the Medicare taxes would make it more difficult for em-

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ployees to perceive their magnitude. Moreover, the Medicare tax was nominally split between employers and employees, further obscuring the employee's full tax burden (Browning 1975). Even today few people understand that the payroll taxes nominally paid by employers are largely borne by employees. Government officials downplayed the regressivity of the payroll tax and ignored the protests of congressmen such as Senator Russell Long (D.-La.), who asked, "Why should we pay the medical bill of a man who has an income of $100,000 a year or a million dollars a year income?" (*Cong. Rec.,* Senate, July 9, 1965, 16096). Although people were told that their money would be put in a separate Medicare trust fund and that they would be paying for "insurance" to defray the cost of illness in their later years, many legislators understood that there would be no such prepayment, referring to the "myth" of prepayment and "the subterfuge of a separate tax and a separate trust fund" (U.S. House 1965b, minority views, 251; *Cong. Rec.,* House, April 8, 1965, 7405). Only the public was fooled.

Finally, there was Wilbur Mills's "three-layer cake." Having blocked passage of Medicare legislation in previous years, Representative Mills (D.-Ark.) decided after the 1964 election that passage of a Medicare bill was inevitable. Accordingly, he would use his copious power as chairman of the House Ways and Means Committee to shape it to his liking.

Mills did so through transaction-cost manipulation. He refused to allow open public hearings on the 1965 bill. Instead, he invited only select technical experts to testify in executive sessions of the committee, allowing them to discuss only the technical aspects of the proposed bills. Discussion of "philosophy" or ideology was ruled out. After the suggestions of the experts had been heard, the executive sessions were closed; the public and the press were barred. No printed record of the closed sessions was made available to Congress or the public. In addition to discussing the administration's King-Anderson bill, Mills and his committee also debated alternative proposed bills, including Representative John Byrnes's (R.-Wisc.) "better-care" bill proposing coverage of physicians' services and the AMA bill ("elder-care") suggesting improvements in the Kerr-Mills program.

To many people's surprise, what emerged from the House Ways and Means Committee with a recommendation for passage was a composite bill that combined the three approaches—a "three-layer cake" along lines first suggested by Wilbur Cohen (U.S. House 1965a, 123-24). The first layer was the King-Anderson approach, financing compulsory federal hospital insurance for the elderly under the Social Security program through additional payroll taxes. The second layer was "voluntary" medical insurance ("supplemental medical insurance") for the elderly that would cover physicians' services, with 50 percent of the premium paid by the subscriber and—despite the ostensibly voluntary nature of the insurance—50 percent paid for out of general revenues of the federal government. The third layer was an expansion of the Kerr-Mills program for the aged poor, partly financed by the federal government and partly financed by state governments.

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This bundle was tied together as the recommended Medicare legislation, which in turn was tied to the other components of the Social Security Amendments of 1965 such as the 7 percent cash benefit increase. Rechristened as H.R. 6675, the committee-recommended bill went to the House floor under a closed rule, which did not permit amendments.

The closed hearings, closed rule, and tying—along with incrementalism, misrepresentation, appealing rhetoric, and cost concealment—were significant components of the transaction-cost augmentation leading to the passage of Medicare (Twight 1997). So constructed, the package was politically irresistible, as confirmed by House and Senate action on the bill in the summer of 1965.[5] Once in place, Medicare institutionalized transaction-cost barriers for the future. As Senator Carl Curtis (R.-Neb.) expressed it:

> [I]f we button it into social security we will write it into perpetuity and will never have another opportunity to consider another plan voluntary in nature involving the private enterprise concept, once the proposed legislation is enacted. Once we start the procedures of taxation and withholding on the basis of a social security withholding tax, it then becomes too late to unscramble the omelet. (*Cong. Rec.,* Senate, July 9, 1965, 16121).

Button it in they did. Thirty years later, some of the same strategies would be used to further increase federal authority over U.S. health care.

The Health Insurance Portability and Accountability Act of 1996

> I don't see the logic . . . of how we could keep that confined to that aged group. The logic looks like once we have done this we are going to have to extend it further. That is why I think logically people say this will lead to socialized medicine, not saying those who advocate it are Socialists—I want to emphasize that again—but would lead to the technique of the Government moving heavily into the entire field of health care.
>
> **Representative Thomas B. Curtis (R.-Mo.)**
> **(U.S. House 1963-64, 137)**

Representative Curtis was right about the logic. As he predicted over thirty years ago, government has continued to move ever more heavily into the "entire field of health care." Steps taken in the intervening years, such as the Health Maintenance

5. The House of Representatives passed the Social Security Amendments (H.R. 6675) on April 8, 1965, by a vote of 313 to 115, approving the conference report by a similar margin (307 to 116) on July 27. The Senate passed a different version of H.R. 6675 on July 9, 1965, by a vote of 68 to 21 and subsequently adopted the conference report on July 29 by a vote of 70 to 24. President Lyndon Johnson signed the Social Security Amendments of 1965 into law on July 30, 1965 (Public Law 89-97).

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Organization Act of 1973, will not be discussed here. Instead, I shall focus on the sequence of events beginning with the Clinton administration's proposal of the Health Security Act in 1993.

The Clinton administration's 1993 proposal, if passed, would have mandated a virtual federal takeover of health-care delivery in the United States, mandating ubiquitous price and service controls administered by regional alliances subordinate to a "National Health Board." The bill was 1,342 pages long, developed in secret by a group of Hillary Clinton's friends and associates.[6] It was presented to the American public with great fanfare, the president touting every American's entitlement to a "health security card" and the comprehensive health benefits said to accompany it. Despite the fanfare, many people became alarmed about the bill's implications when articles were published detailing extensive criminal sanctions to be applied to physicians and regimentation to be mandated throughout U.S. health-care markets under the Health Security Act. The bill died, and many people breathed a great sigh of relief.

That sigh of relief was premature. Intentionally or unintentionally, advocates of more invasive government controls over U.S. health care took a page from the 1965 Medicare strategy book. Many of the strategies used to pass Medicare in 1965 were deployed again in 1996 to secure passage of the Health Insurance Portability and Accountability Act.

Although the title of the Health Insurance Portability and Accountability Act of 1996 sounds wholly benign, its content is not. By using the strategies of transaction-cost manipulation that served Medicare's proponents so well in 1965, advocates of government control over U.S. health care secured passage of a law that includes some of the most feared provisions of the Clinton administration's 1993 Health Security Act. Many of the 1993 provisions that potentially threaten innocent physicians with federal criminal penalties and jeopardize the privacy of doctor-patient relations through a nationwide electronic database literally were copied from the earlier bill and included verbatim in the 1996 law. Yet dissent—or even attention to these provisions—scarcely arose. With little notice in the press, the House and Senate gave virtually unanimous final approval to the Health Insurance Portability and Accountability Act in early August 1996.[7]

Little-Known Provisions of the 1996 Bill

Without doubt, the Health Insurance Portability and Accountability Act of 1996 contains some features that most Americans value highly, including portability provisions

6. Intellectual candor requires acknowledgment that it was 1,342 pages in *double-spaced* format. Perhaps in future years there will be a movement to distribute bills to the public only in single-spaced format.

7. As noted earlier, the votes giving final approval to the conference report were 421 to 2 in the House and 98 to 0 in the Senate (August 1-2, 1996). Prior votes occurred in the spring, the House of Representatives passing H.R. 3103 by a vote of 267 to 151 on March 28, 1996, and the Senate passing its version of the bill by a vote of 100 to 0 on April 23, 1996.

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to prevent loss of health insurance triggered by job changes, significant health insurance access and renewability guarantees, and—on an experimental basis—medical savings accounts to establish greater individual financial stakes (and hence cost consciousness) in making health-care choices.[8] Ironically, during the 1996 bill's consideration few acknowledged that some of the problems at which its provisions were aimed—job lock, inadequate portability—themselves arose from earlier government interventions.[9] This history notwithstanding, the appeal of the core ideas of portability and renewability cannot be overstated: the *Congressional Record* is rife with the stories of people whose long-standing insurance coverage was canceled after serious illness occurred and others whose continued coverage, due to family illness, depends on staying in their present job. Highlighted in congressional and media statements, the portability and renewability issues figured importantly in political strategies used to secure the bill's passage, as will be discussed later.

But Congress and the press did not openly tell the public about other provisions, including a bevy of federal criminal sanctions potentially threatening innocent physicians and a national electronic database threatening the privacy of individuals' medical records. Most of these provisions appear in Title II of the new law under the heading "Preventing Health Care Fraud and Abuse; Administrative Simplification."[10] Although many congressmen's fears about these provisions were quieted as proponents insisted that "[t]his is not 'Clinton Lite,'" such acquiescence was misguided (*Cong. Rec.*, Senate, April 18, 1996, 3543).

8. Medical savings accounts (MSAs) were hotly debated during consideration of the 1996 bills. A provision authorizing MSAs was included in the original House bill (H.R. 3103) but not in the substitute Senate bill (S. 1028). The MSA provision included in a Senate amendment offered by Senator Robert Dole (R.-Kans.) was deleted on a recorded vote of 52 to 46 (*Cong. Rec.*, Senate, April 18, 1996, 3568). During floor consideration, proponents clearly stated the positive role of MSAs in increasing patient choice: Senator Rick Santorum (R.-Pa.) suggested that they be called "Patient Choice Accounts." Senator Phil Gramm (R.-Tex.) identified MSAs as one of two fundamental reforms capable of improving the existing health-care system (*Cong. Rec.*, Senate, April 18, 1996, 3539, 3566). Professor Milton Friedman's (1996) article supporting MSAs was entered into the record on more than one occasion (*Cong. Rec.*, Senate, April 18, 1996, 3540-41, 3555-56). The House-Senate conference committee compromised by authorizing a four-year experiment with MSAs as described in the text.

9. Citing the origin of today's employer-provided health care in World War II's wage and price controls, Milton Friedman (1996) noted that "[b]ecause private expenditures on health care are not exempt from income tax, almost all employees now receive health care coverage from their employers, leading to problems of portability, third party payment and rising costs that have become increasingly serious" (A20). Even the push for a federal solution to many insurance-coverage problems flowed from earlier legislation. Senators and the General Accounting Office (GAO) said that states could not solve key problems because earlier Employee Retirement Income Security Act of 1974 (ERISA) legislation had preempted state insurance regulation for a large category of health benefit plans, namely, employer self-funded health plans. As Senator James M. Jeffords (D.-Vt.) put it, "ERISA preemption effectively blocks States from regulating most employer-based health plans. . . . [E]mployer plans that cover 44 million people have elected to self-fund and avoid the State insurance laws" (*Cong. Rec.*, Senate, April 18, 1996, 3519-20).

10. Although the outcome might have been different had the heading been phrased "Criminalizing Private Medical Practice; Compulsory Electronic Database," such forthrightness would have been altogether inconsistent with transaction-cost manipulation theory.

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One of the purposes of the new law is to limit Medicare fraud, said to cost Americans approximately $18 billion annually (*Cong. Rec.,* Senate, April 18, 1996, 3568). Accordingly, the new law establishes a "fraud and abuse control program" to be administered by the Department of Health and Human Services (HHS) and applied to any "federal health care program," defined as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government" as well as any "state health care program" [§204(f)].

In provisions cribbed from §5401 of Clinton's 1993 bill, the 1996 act empowers the secretary of HHS, inter alia, "to conduct investigations, audits, evaluations, and inspections relating to the delivery of and payment for health care in the United States," to "arrange for the sharing of data with representatives of health plans," and to secure "qualified immunity" for those who provide information to the secretary or the attorney general [§201]. Like the rejected 1993 bill's §5402, it establishes a "Health Care Fraud and Abuse Control Account." In a section labeled "Beneficiary Incentive Programs," the 1996 law authorizes the secretary of HHS to "encourage" informants and to pay them a portion of amounts collected as a result of their disclosures [§203(b)].[11]

Civil Penalties

Civil penalties under the 1996 act apply to medical practice involving federal health-care programs, including Medicare and other federal programs, as well as state health-care programs. Preexisting civil penalties are increased (in general from $2,000 to $10,000 per violation) and broadened in ways that may include innocent efforts by practitioners to render appropriate health-care services to patients. For example, a new provision makes a physician's miscoding of insurance claims filed with any federal or state agency subject to civil penalties of up to $10,000 for each instance. Under a provision of the new law headed "Claim for Item or Service Based on Incorrect Coding or Medically Unnecessary Services," civil sanctions can be applied to any person who "engages in a pattern or practice of presenting or causing to be presented a claim for an item or service that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person knows or should know is applicable to the item or service actually provided" [§231(e)]. Dr. Jane Orient, a private practitioner and the executive director of the Association of American Physicians and Surgeons, reports that "there are thousands of codes and no consistent interpretation" of them (Orient 1996). Yet the secretary of HHS and the courts are

11. Other provisions reflect lawmakers' bias in favor of health maintenance organizations (HMOs). The new law authorizes "intermediate sanctions" for HMOs that have failed to live up to their contracts with the federal government and specifically requires that the secretary of HHS "first provid[e] the organization with the reasonable opportunity to develop and implement a corrective action plan to correct the deficiencies" [§215(a)]. No such opportunity is accorded private fee-for-service physicians.

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now empowered to determine after the fact what the doctor should have known about them.[12]

Civil sanctions also are to be applied if a health-care provider makes a claim "for a pattern of medical or other items or services that a person knows or should know are *not medically necessary*" [§231(e), my emphasis]. Again, the HHS secretary is empowered to determine *ex post* whether something was or was not "medically necessary." Under such rules, every physician who serves patients participating in any federal or state health-care program is potentially subject to governmental second-guessing and the threat of concomitant civil penalties.

Reminiscent of the Medicare controversy in the 1960s over the "control" issue, again in 1996 official disclaimers were written into the record about the intended scope of the legislation. Because disclaimers in conference or committee reports, though part of the bill's legislative history, are not part of its language and did not become statutory law, they often served chiefly to disarm opposition to questionable provisions without in fact limiting the bill's scope.

A case in point involves the civil sanctions just described. In response to fears expressed by practitioners of alternative medicine, the conferees stated in the conference report that they "do not intend to penalize the exercise of medical judgment of health care treatment choices made in good faith and which are supported by significant evidence or held by a respectable minority of those providers who customarily provide similar methods of treatment," adding that the act "is not intended to penalize providers simply because of a professional difference of opinion regarding diagnosis or treatment" (U.S. House 1996b, 255). Statutory language broad and ambiguous enough to trigger such a disclaimer highlights the dangerous scope of authority granted by the new law.

Physicians' experience under prior Medicare law heightens these concerns. During the late 1980s and early 1990s the Medicare bureaucracy threatened to penalize nonparticipating physicians whose patients over age sixty-five contracted with them to obtain services outside the Medicare system, even though no reimbursement would be sought from Medicare in these cases. Physicians received official correspondence from Medicare carriers and administrators stating that such private contracting was largely inconsistent with Medicare law. Many patients were furious. As one patient stated, "'Why should I wake up with fewer rights on turning 65 than I had the day before?'" (Copeland 1993, 9).

In 1991 Dr. Lois Copeland and five representative patients brought suit against the secretary of HHS, Dr. Louis Sullivan, challenging this interpretation of Medicare

12. The term "should know" is defined in the statute to mean "deliberate ignorance" or "reckless disregard of the truth or falsity of the information" [§231(d)]. The relevant code sets will change with full implementation of the 1996 act. As part of new governmental authority to require creation of an electronic database (discussed later), the act requires the secretary of HHS to select or establish code sets for data elements describing "transactions" included in the database [§262(a), sec. 1173(c)].

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law.[13] Judge Nicholas Politan dismissed the case, ruling that the evidence did not establish that the HHS Secretary had a clearly articulated "policy" interpreting the Medicare law to prohibit private contracting.[14] Attorneys for HHS were unable to identify the source of the Medicare carriers' statements. As Dr. Copeland (1993, 10) put it, "physicians actually [had been] coerced into following a regulation that did not exist."

Although the case was dismissed, Dr. Copeland stated that the plaintiffs "considered this ruling to be an absolute victory" (Copeland 1993, 10). By upholding the plaintiffs' standing to sue in this case, the judge opened the door for their return to court if the HHS secretary subsequently issued an explicit policy against private contracting. In the meantime, their primary objective was achieved: physicians were now free to establish private contracts with their elderly patients outside of Medicare.

This victory was short-lived. As part of the Balanced Budget Act of 1997 (Public Law 105-33, 111 Stat. 251), Congress included a provision that makes such private contracts between doctors and elderly patients virtually impossible. The Balanced Budget Act effectively kills private contracting by requiring any physician who contracts privately (wholly outside Medicare) with even one patient over age 65 to file a signed affidavit with the federal government stating that he will not submit *any* claims to Medicare for *any* patient "during the 2-year period beginning on the date the affidavit is signed" [§4507(a)(3)]. That is, to form a voluntary contract outside of Medicare with one elderly patient, a physician must renounce any and all Medicare patients for a full two-year period. Commentators have pointed out that this gives elderly Americans fewer rights to pay for their medical care than British retirees possess under their country's largely socialized system of medicine (Brown 1997)

House and Senate bills already have been drafted seeking to reverse this outrageous statutory deprivation of liberty. Court challenges also are expected. Nonetheless, the systematic efforts by the Medicare bureaucracy and compliant legislators to restrict people's right to pay for their own health care—despite statutory language in the original Medicare legislation disavowing such control—make it clear that the federal government cannot be relied on to interpret narrowly the broad discretionary authority in the 1996 act.

New Health-Care Crimes

Equally disturbing, the 1996 act threatens innocent physicians with potential prosecution for loosely drawn new crimes accorded the Orwellian designation of "federal

13. I thank Professor Edward Zajak (University of Arizona) for calling my attention to this case and the issues it raised.

14. *Stewart et al. v. Sullivan et al.*, 816 F.Supp.281, U.S. District Court, District of New Jersey, No. 92-417, October 26, 1992. The plaintiffs' evidence consisted of various bulletins to physicians from the official state Medicare carrier (Blue Cross/Blue Shield) and letters to physicians from various officials in the Health Care Financing Administration (HCFA), Medicare's administrative arm.

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health care offenses," investigation of which confers broad subpoena power on the U.S. attorney general [§248]. Unlike the new law's civil sanctions, the criminal penalties discussed here reach all private contracts for medical services: they are not limited to medical practice in connection with Medicare and other federal or state health-care programs.

In provisions copied almost verbatim from the 1993 Health Security Act, the 1996 law establishes as crimes "health care fraud," "theft or embezzlement in connection with health care," "false statements relating to health care matters," and "obstruction of criminal investigations of health care offenses"[15] [§§242–45]. These labels suggest that the forbidden behavior is Bad Stuff, and some of it clearly is. The question is, can any Good Stuff be prosecuted under the language of the new rules—and, if so, what effects will the threat of federal criminal prosecution have on honest medical practitioners?

The new rules penalize actions relating to "health care benefit programs," defined in the statute to include every "public or private plan or contract" in which "any medical benefit, item, or service is provided to any individual," specifically including "any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract" [§241]. Private fee-for-service physicians most definitely are included. The criminal penalties established for violation of the new crimes typically involve up to ten years in prison in addition to large fines and property forfeiture.

Consider the new crimes. Copied almost verbatim from the Clinton administration's 1993 bill, §5431(a), the new federal crime of "health care fraud" specifies criminal penalties of up to ten years in prison plus fines for anyone who "knowingly and willfully executes, or attempts to execute, a scheme or artifice (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program" [§242(a)]. The prison sentence is up to twenty years if the violation "results in serious bodily injury" and up to life in prison if anyone dies. Even an *attempt* to undertake the proscribed behavior could land a physician in jail for ten years. Because determination of what constitutes "knowing" and "willful" behavior can come only after the fact, innocent behavior potentially falls under the broad umbrella of this language. Moreover, attempting to secure payment for a procedure that the physician considered to be medically necessary (and that helped the patient) but that later was deemed unnecessary by government officials could be deemed a "false representation." If a patient died in such a situation, the doctor could face a potential sentence of life in prison.

15. "Investigative demand procedures" authorized in such cases include subpoena power to require production of relevant records [§248].

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Again the conference report, though not the statute, contains a disclaimer. The conference report states regarding §242 that the act "is not intended to penalize a person who exercises a health care treatment choice or makes a medical or health care judgment in good faith simply because there is a difference of opinion regarding the form of diagnosis" (U.S. House 1996b, 258). The very existence of such a disclaimer again shows that the language of the statute is broad enough to allow federal authorities to initiate prosecution in situations involving controverted medical judgments.

The second new federal crime, "Theft or embezzlement in connection with health care," was lifted in its entirety from §5437 of the Clinton administration's 1993 bill. Fines and imprisonment of up to ten years (or up to one year if the amount in question is *$100 or less!)* await anyone who "knowingly and willfully . . . without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program" [§243].

The third new federal crime, making "false statements relating to health care matters," specifies fines and up to five years of prison time for anyone who "knowingly and willfully—(1) falsifies, conceals, or covers up . . . a material fact; or (2) makes any materially false . . . statements or representations . . . in connection with the delivery of or payment for health care benefits, items, or services" [§244]. Again the language was copied almost verbatim from the Clinton administration's 1993 bill, §5433. Because what is "knowing and willful" ultimately can be determined only in court, every fee-for-service physician becomes vulnerable under these provisions, and mistakes or controverted judgments of medical necessity may portend criminal prosecution.

Finally, there is the new federal crime of "Obstruction of criminal investigations of health care offenses." In a provision that threatens not only physicians but also the privacy of medical records, the 1996 law specifies fines and up to five years in prison for anyone who "willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator" [§245]. The proscribed behavior need not be "knowing," only "willful." Accordingly, under this language a deliberate decision to withhold medical records for whatever reason—due to concerns about patients' privacy or even uncertainty about the requesting party's authority—could be used to threaten a physician with prison time.

Thus, physicians engaged in fee-for-service practice will live under constant threat of the criminal penalties that permeate this new law. The property forfeiture provision alone is noteworthy, requiring the court to order anyone convicted of a federal health-care offense "to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense" [§249]. A doctor's house and other assets could be at risk. Like the other provisions cited, this too was copied from the 1993 Clinton administration proposal [§5432].

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Electronic Database

American citizens have more to fear in this act than the consequences of potential misapplication of the criminal penalties described. Under the heading of "Administrative Simplification," the Health Insurance Portability and Accountability Act of 1996 mandates creation of a uniform electronic database that jeopardizes the privacy of medical records and intrudes upon doctor-patient relationships nationwide to a degree unprecedented in the United States. In circumstances to be explained later, these provisions allow the federal government to require private practitioners to divulge information about their patients, even though no federal health-care program such as Medicare is involved. Contrary provisions of state law are largely superseded [§262(a), sec. 1178].

The 1996 act empowers the federal government to require detailed information, at its discretion, on what lawmakers call "encounters" between doctors and patients. The lawmakers' stated purpose in so doing is "to improve the Medicare program . . . , the Medicaid program . . . , and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information" [§261]. "Standards and requirements" will abound. The plan of the statute is to require medical practitioners to comply with data encoding and transmission standards, to require the secretary of HHS to establish such standards, to identify covered transactions, to require the electronic transfer and sharing of information as ordered by the secretary of HHS, and to impose penalties for failure to comply with the secretary's standards for data recording and transmission.

The language of the statute is broad. Central to the interpretation of key sections is the meaning of the phrase "health information," which is defined to include just about everything:

> The term "health information" means any information, whether *oral or recorded* in any form or medium, that—
>
> (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (B) *relates to the past, present, or future physical or mental health or condition of an individual*, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual. [§262(a), sec. 1171; my emphasis]

Subsequent language requires the secretary of HHS, within eighteen months in most cases, to "adopt *standards* for *transactions*, and data elements for such transactions, to

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enable *health information* to be exchanged electronically . . . [and] establish specifications for implementing each of the standards adopted" [§262(a), secs. 1172(d), 1173(a); my emphasis]. Compliance with the standards is mandatory for all health plans, healthcare clearinghouses, and any "health care provider who transmits any health information in electronic form in connection with a transaction" referred to in the preceding provision. That is, if a private physician transmits *any* patient medical information pertaining to such a transaction in electronic form (which may include most physicians who use computers in their medical practice), then the physician can be compelled to comply with "standards" that the secretary of HHS creates. Where will such information go? At a minimum, anywhere it is required by government or by private contract to be sent. Indeed, the secretary of HHS is specifically mandated to establish "standards for transferring among health plans appropriate standard data elements" [§262(a), sec. 1173(f)]. Moreover, despite intended safeguards to be described, once the information is received in electronic format it can be retransmitted at will.

The secretary's standards are to apply to "transactions," defined to include, among others, "Health claims or equivalent encounter information" and "Health claims attachments." These are labeled as "financial and administrative transactions," despite the broader reach suggested by the provision's "encounter information" and "health claims attachments" language. Standards must be "appropriate for" any "financial and administrative transactions determined appropriate by the secretary, consistent with the goals of improving the operation of the health care system and reducing administrative costs" [§262(a), sec. 1173(a)]. Open-ended discretionary authority in these matters is given to the secretary of HHS.

Again disclaimers appear, this time in the House Ways and Means committee's original report on the bill. The committee there stated that these provisions are "limited to financial and administrative transactions" and that the committee did "not intend for these requirements [to] apply to information collected that is beyond this scope such as . . . *personnel records* of employers who provide health plan benefits or *medical records of patients*" (US House 1996a, 99; my emphasis). No similar statement about medical records of patients appears in the conference report or in the statute.

The statutory language casts doubt on this disclaimer for at least two reasons. First, the law requires "standards for transactions . . . to enable *health information* to be exchanged electronically, that are *appropriate for*"—not limited to—financial and administrative transactions. Second, as already noted, the term "health information" as used in this provision is defined broadly, and standards are allowed to govern "transactions" that include doctor-patient "encounter information." Had lawmakers intended to create firm limits on the targeted information, such provisions would have been easy to draft. As the 1996 act stands, because "encounter information" and "health information" clearly reach private conversations between doctors and patients, the law

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seems to create a federal power much broader than the House Ways and Means Committee's disclaimer suggests.

But the secretary's authority is greater still. As noted, a key part of the power in this provision is power to adopt standards that will enable "health information"—everything a doctor or employer or university or life insurer ever learns about you—"to be exchanged electronically." To facilitate such exchange, another provision lifted from the Clinton administration's 1993 proposal requires the secretary of HHS to adopt standards "providing for a standard *unique health identifier* for each individual, employer, health plan, and health care provider for use in the health care system" [§262(a), sec. 1173(b), patterned after 1993 §5104; my emphasis]. Congressmen understood in passing the bill that the mandated standard health identifier might turn out to be people's social security numbers.

There are civil monetary penalties (not to exceed $25,000 per calendar year) for noncompliance with the secretary's standards, with broad discretionary authority given to HHS in applying them [§262(a), sec. 1176]. Threatening more federal intrusion in the future, the new law requires an advisory committee to "study the issues related to the adoption of *uniform data standards for patient medical record information and the electronic exchange of such information,*" requiring the committee to make "recommendations and legislative proposals for such standards and electronic exchange" within four years [§263(4); my emphasis].

Almost as an afterthought, lawmakers instructed the secretary to make recommendations within twelve months regarding "standards with respect to the privacy of individually identifiable health information," while explicitly permitting a total of forty-two months to elapse before privacy regulations need be applied [§264]. Another provision requires the secretary of HHS to establish limited "security standards" for health information, taking into account costs as well as the capabilities of small health-care providers [§262(a), sec. 1173(d)]. Those subject to the secretary's database-related standards also are admonished to maintain "reasonable and appropriate" safeguards. A separate provision gives nominal deference to privacy by authorizing fines and imprisonment for unlawful disclosure of individually identifiable health information or unlawful use of a unique health identifier [§262(a), sec. 1177]. But these provisions are empty boxes: violations are to be defined by standards not yet formulated.

The threats to the private practice of medicine and to doctor-patient relationships contained in the Health Insurance Portability and Accountability Act of 1996 are evident. Privacy regulations coming as much as three and one-half years after the bill's passage may be futile, as by then people's medical histories will likely be ensconced in databases held by insurance companies, government agencies, hospitals, and private consultants. Given the public outcry in 1993, how could these provisions have been approved in 1996 without substantial resistance within Congress and by the public?

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Role of Political Transaction-Cost Manipulation in the 1996 Bill's Passage

The answer is, by the skillful use of transaction-cost manipulation. Its use in this case was not surprising. The theory outlined earlier predicts that government officials' incentives to support transaction-cost-increasing measures depend on specific variables. With the 1996 act, changes in these determinants were consistent with use of these strategies in passing the new law. President Clinton's renewed executive support pushed in that direction, as did the increased support of both political parties for some type of health-care legislation. Accordingly, the ideology variable more pervasively supported transaction-cost augmentation to blunt resistance to the measure. Moreover, there existed an appealing rationale: the specter of "job lock" and individuals' being denied insurance due to preexisting medical conditions evoked widespread public sympathy. Legislators perceived the measure's portability provisions as vitally important to constituents. The complexity of the 168-page single-spaced bill suggested further transaction-cost increases. Also pushing toward transaction-cost augmentation on this issue was the new law's promise of enhanced job security and potential third-party payoffs for government officials, likely products of expanded government power and increased dependence of the populace on the federal government. The passage of time since 1993 had served more to entrench relevant interest groups than to inform the public. Part of the reason for the widespread public ignorance on this topic in 1996—and perhaps the biggest change in the relevant variables since 1993—was the utter failure of the popular press to publicize negative features of the proposed legislation.

During consideration and passage of the Health Insurance Portability and Accountability Act of 1996, public resistance to its authorization of governmental encroachments on the private practice of medicine and people's private relationships with their physicians was virtually nonexistent. Gone were the outspoken protests of 1993. Dr. Jane Orient, one of the few who warned the public of the impending power shift, said she believed the passivity existed because people "don't read" (Orient 1996). I believe the explanation is more complex. Strategies used in 1996 closely paralleled those used to pass the original Medicare statute in 1965 and, like the earlier techniques, relied heavily on government manipulation of political transaction costs facing the public. Again in 1996, incrementalism, tying, misrepresentation, and appealing rhetoric were fundamental to the bill's passage. Consider the similarities.

Incrementalism

Having failed to win in the 1940s, advocates of universal national health insurance narrowed their compulsory health insurance proposals in the 1950s to cover only the elderly. A piece at a time, they got disability insurance (1956), medical assistance for the aged poor (1960), and finally Medicare.

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Likewise, in the years leading up to 1996, when advocates of comprehensive federal government control over the U.S. health-care system found that they couldn't win on their broad 1993 Health Security Act proposal, they narrowed it. As with Medicare, they deliberately focused on the most appealing and popular aspects of their proposals—in this case the portability, accessibility, and renewability of health insurance and (for some) medical savings accounts.

In congressional debates, members admitted their intent to proceed incrementally. As Senator Arlen Specter (R.-Pa.) expressed it, the bill "should be viewed as the first step of an incremental approach to health care reform" (*Cong. Rec.,* Senate, April 23, 1996, 3818). On the day of final House passage of the bill, Representative Anthony C. Beilenson (D.-Calif.) conveyed his hope that "this is just a first step" (*Cong. Rec.,* House, August 1, 1996, 9777), and Representative Harris W. Fawell (R.-Ill.) said that "we will be back next year fighting . . . with renewed vigor" for further reforms (*Cong. Rec.,* House, August 1, 1996, 9779). On the Senate floor, Senator Edward M. Kennedy (D.-Mass.) stated that the "passage of the legislation is the beginning of a journey, not an end," anticipating that in the near future Congress would "move on to the broader field of universal health care coverage in one way or another"—what Senator John D. Rockefeller IV (D.-W.Va.) called "the next round of health care reform" (*Cong. Rec.,* House, August 1, 1996, 9504, 9508, 9513).

The next round already has occurred. As part of the August 1997 Balanced Budget Act (Public Law 105-33, 111 Stat. 251), legislators approved a child-health-insurance program that has been called "the biggest new social program since Medicare" (Goldberg 1997). Though said to provide federal funds for state programs to provide health care for low-income children, the new law actually allows assistance to be provided for families whose income is up to 200 percent or more above the poverty line [§4901, sec. 2110(c)]. Between fiscal years 1998 and 2007, the law appropriates $39,650,000,000—roughly $40 billion—in nominal dollars for this program [§4901, sec. 2104(a)]. Anticipating that the "new 'kid care' plan will be available to every child in families with income of up to $50,000 a year," Goldberg (1997) warns that the purpose and likely outcome of the program are to "consolidate government control over health care by moving as many middle-class children into federally funded and regulated health programs as quickly as possible," an assessment consistent with Senator Kennedy's recent statement that "'this is a major step forward' toward national health insurance." We can expect legislators' deliberate use of incrementalism to continue.

Tying

The 1965 compulsory hospital insurance for the elderly was tied to other legislation at two levels. On one level it was tied to the other two layers of Mills's three-layer cake, supplemental medical insurance and liberalization of Medicaid. Moreover, the whole Medicare package was tied to the 7 percent increase in cash benefits for Social Security

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recipients and bundled with the Social Security Amendments of 1965, with the House of Representatives not even allowing a vote on the issue of deleting Medicare from the Social Security amendment package.

Similarly, in 1996 legislators tied the popular measures for health-insurance access, portability, and renewability (as well as provisions increasing self-employed people's tax deductions for health care) to the electronic database and criminal/civil penalty provisions. This package deal made it politically impossible to vote against the 1996 bill. Voting against it would have required a senator or representative to go on record appearing to support insurance-related "job lock," Medicare fraud, and continued use of widely abhorred exclusions for preexisting medical conditions. In 1996 as in 1965, tying the popular with the controversial dramatically increased the cost to voters and to dissatisfied lawmakers of resisting the proposed legislation.

Misrepresentation

Misrepresentation was fundamental to passage of the 1965 Medicare bill. Similar misrepresentation occurred with passage of the Health Insurance Portability and Accountability Act of 1996, permeating the language of the bill and official statements about its content.

The appealing language in the act's title set the tone: who could oppose such apparently desirable ends as health-insurance "portability" and "accountability"? Legislators described the bill as "consensus" legislation. Senator Nancy L. Kassebaum (R.-Kans.) stated that "There is no controversy about the central elements of the bill" (*Cong. Rec.,* House, March 28, 1996, 3034; *Cong. Rec.,* Senate, August 2, 1996, 9502). Government officials repeatedly told the press that this bill concerned health-insurance "access, portability, and renewability" and medical savings accounts (MSAs). According to official sources, the only issue was whether the House and Senate could agree on an MSA provision.

Hardly anyone spoke about the proliferation of loosely drawn new "federal health care offenses" with criminal penalties that permeated the bill. Senator Orrin G. Hatch (R.-Utah), one of the few who alluded to the issue, stated that "we need to ensure that these [antifraud] efforts do not penalize innocent behavior or unintentionally bog down the delivery of health care." He reminded his colleagues that

> The practice and delivery of health care is overwhelmingly conducted by honest and well meaning individuals who should not be suspected of wrongdoing merely because they are physicians, hospital administrators or other health care providers. Creating a cloud of suspension [*sic*] over the entire health care community will not solve the fraud problem when only a few are guilty of wrongdoing. . . . Equally important is that antifraud provisions avoid penalizing innocent individuals for inadvertent or clearly innocent behavior. (*Cong. Rec.,* Senate, August 2, 1996, 9524)

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Although Senator Hatch acknowledged that judgments regarding "medical necessity" may differ—in my judgment making every physician governed by the 1996 act potentially subject to prosecution under its rules that forbid false claims of "medical necessity"—he acted as if the requirement for "knowing and willful" behavior to establish criminal liability provided an adequate safeguard. He did not mention the act's imposition of civil penalties for claims that a physician "knows or should know are not medically necessary" [§231(c)]. Nor did his colleagues raise these issues as passage neared. Only Representative Sheila Jackson-Lee (D.-Tex.) in the House protested that she was "disturbed" that the bill "would burden physicians with overly burdensome fraud provisions," asserting that eliminating fraud "should not be at the expense of making criminals of physicians that provide us good health care across the Nation" (*Cong. Rec.*, House, August 1, 1996, 9790).

Neither did most congressmen talk publicly about the provisions for a national electronic database. Representative Jim McDermott (D.-Wash.) was almost alone in identifying the threat to privacy created by the national electronic database, reminding colleagues on the day of the bill's passage that as a result of the provisions on administrative simplification "this is the day that we voted to give the insurance companies the right to use your Social Security number and gather all the information in a clearinghouse for which there is no privacy protection in this bill." He added:

> Now people want to think that it is called "administrative simplification," but simply what it does is give the insurance companies the ability to shift information back and forth, use it against applicants for life insurance, auto insurance, homeowners insurance. Anything they want to do, they can do in this bill because there is not one single shred of protection of your privacy. . . . That means if a patient goes to see the doctor and tells the doctor anything that has gone on in their [*sic*] life, the doctor could be compelled by the insurance company data system to release that information because there is nothing, nothing in here that protects the doctor-patient relationship. . . . [W]e are taking away people's privacy." (*Cong. Rec.*, House, August 1, 1996, 9792)

In the House of Representatives, a substitute measure that omitted the antifraud and electronic database provisions failed on a vote of 192 to 226 (fourteen not voting) (*Cong. Rec.*, House, March 28, 1996, 3137-38).

On the day of the Senate's passage of the bill, only two senators commented on its threat to privacy. Senator Paul Simon (D.-Ill.) criticized the database provision for accelerating "the creation of large data bases containing personally identifiable information" that might be perused by "prying eyes," describing the bill's allowance of a potential forty-two-month time lag before adopting privacy protection as "put[ting] the cart before the horse" (*Cong. Rec.*, Senate, August 2, 1996, 9516). Senator Patrick J. Leahy (D.-Vt.) added that "[w]hen the American people become aware of what this law requires and allows by way of computer transmission of individually identifiable

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health information without effective privacy protection, they should demand, as I do, prompt enactment of privacy protection" (*Cong. Rec.*, Senate, August 2, 1996, 9523).

In addition to these larger misrepresentations of the bill's content, the 1996 Health Insurance Portability and Accountability Act is rife with misleading language. "Beneficiary incentive programs" include the paying of informants, "federal health care programs" include state health-care programs, and "administrative simplification" cloaks national electronic-database mandates. Threats to liberty are alternately covered with pleasant-sounding phrases or obscured by stigmatizing language of criminal misconduct ("fraud and abuse," "health care fraud"). Lip service in the new law to privacy and the protection of individually identifiable health information parallels the nominal statutory deference to avoidance of government "control" in 1965.

Likewise, few inside or outside of Congress cited the costs associated with the legislation. Senator Phil Gramm (R.-Tex.), an economist, asked if it was "somehow magic that through Government edict we can bestow billions of dollars of benefits on our fellow citizens at no cost . . . whatsoever?" Based on the bill's requirements for insuring higher-risk individuals, Senator Gramm predicted that "at the end of the first full year of its implementation, the cost of individual private health insurance policies will rise by a minimum of 10 percent," which he called a "conservative estimate" (*Cong. Rec.*, Senate, April 18, 1996, 3538).

Even the health-insurance portability, renewability, and access provisions are not what they seemed. Senator Nancy Kassebaum (R.-Kans.) stated that the new law "will guarantee that those who need coverage the most are not shut out of the system." Echoed by many supporters of the bill, she said that the bill will eliminate health-insurance barriers to changing jobs ("job lock") and "will mean the world to millions of Americans who will no longer live in fear that they will lose their health coverage when they change jobs or lose their job" (*Cong. Rec.*, Senate, August 2, 1996, 9502).

Although the new law undoubtedly will reduce job lock, its portability mandates are not as broad as many proponents implied. Its portability provisions prohibit insurance companies only from denying coverage for preexisting medical conditions and from singling out specific individuals, based on their medical history, for higher premiums.[16] Less widely communicated to the public was that the law—properly from an economic point of view—allows insurance companies to raise premiums to the group as a whole or, in certain circumstances, to eliminate particular benefits entirely, so long as it is done uniformly. As Senator Kassebaum (R.-Kans.) stated:

> This provision is meant to prohibit insurers or employers from excluding employees in a group from coverage or charging them higher premiums

16. In general, the maximum allowable waiting period before coverage of a pre-existing condition begins is twelve months. The law specifies circumstances in which this waiting period may be reduced by years of "creditable coverage" under another health plan [§102, sec. 2701].

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> based on their health status and other related factors that could lead to higher health costs. *This does not mean that an entire group cannot be charged more.* But it does preclude health plans from singling out individuals in the group for higher premiums or dropping them from coverage altogether. (*Cong. Rec.,* Senate, April 23, 1996, 3832; my emphasis)

Representative McDermott (D.-Wash.) put it more succinctly: "No one listening to this should think that portability means what I have now I will have tomorrow, because it simply is not so" (*Cong. Rec.,* House, March 28, 1996, 3087).

Moreover, some of the provisions enhancing people's access to insurance are more limited than the public in general has been told. Although the bill does not benefit people who have never had group health insurance, it is said to assure that people who lose their coverage through a group policy will have access to individual health insurance. Yet Senator J. Robert (Bob) Kerrey (D.-Nebr.) noted that the bill will do much less: "The conference agreement will allow insurance companies to offer only two policies—and even though the bill includes some requirements for these plans, I am concerned that insurers may be able to charge these individuals exorbitant rates" (*Cong. Rec.,* Senate, August 2, 1996, 9523). In addition, access provisions aimed at the group-insurance market apply only to small businesses having fifty or fewer employees [§102, sec. 2711]. As Representative Fortney Pete Stark (D.-Calif.) noted, the bill "limited the guaranteed issue to small businesses of 50, so a firm of 51 people does not have guaranteed access while a firm of 50 does" (*Cong. Rec.,* House, August 1, 1996, 9786).

Along with the tying and the incremental strategies, misrepresentation on these key issues helped to secure passage of the act, establishing a structure that would permanently increase the transaction costs to private citizens of resisting an expanding role for the central government in their personal medical affairs.

Conclusion

> Sometimes . . . I wonder who we Senators think we are when we sit in our seats and pompously say we know so much more about the affairs of the average family in America than anyone else that we can compel them to make financial determinations which they themselves think are unwise for them to make. I somehow doubt that we have the Olympian wisdom that enables us to pontificate for all of society.
>
> **Senator Karl Mundt (R.-S.D.)**
> **(*Cong. Rec.,* Senate, July 9, 1965, 16121-22)**

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Most were not as modest as Senator Mundt (R.-S.D.) about Congress's "Olympian wisdom" enabling members to "pontificate for all of society" in passing Medicare. After the tying and misrepresentation that made possible its enactment, the 1965 Medicare law created built-in transaction-cost-increasing mechanisms that assured the program's growth. The insurance imagery, payroll taxes, and incentives of current recipients to foist off costs on future generations all worked to increase the transaction costs of taking political action to "unscramble the omelet." Once Medicare became part of the U.S. institutional structure, an entitlement mentality, ideological change, and baser political and economic interests combined to assure its entrenchment—regardless of costs or consequences.

The Health Insurance Portability and Accountability Act of 1996 will have similar consequences. Produced by means of transaction-cost-increasing strategies, the 1996 law authorized a superstructure of new regulations that will spawn ever-increasing federal controls over medical practice and formerly private doctor-patient relationships. Cost increases caused by forced alteration of insurers' risk pools will trigger demand for such controls, even as increased regulatory compliance costs and vulnerability to federal prosecution drive more doctors out of private practice.

The dangers transcend the immediate ones represented by the national electronic database, mandated distribution of confidential patient information, and the web of new federal civil and criminal penalties threatening honest doctors. If this law stands, people gradually will become accustomed to the new federal intrusiveness: future generations will know nothing else. Ideological change will follow, making it increasingly difficult to reestablish a system in which the privacy of medical information and the primacy of doctors' medical judgments are sacrosanct. As Representative Jim McDermott (D.-Wash.) warned his colleagues about the threat to privacy, "You are going to come to rue the day that you pass this bill without talking about it" (*Cong. Rec.*, House, March 28, 1996, 3038). Rather than talk about it, they gained short-run political benefits by uncritically applauding a measure said only to establish health insurance "portability" and "accountability." Unfortunately, the new levers of government power thereby created will long outlast those transitory personal political gains, and all Americans who cherish freedom will "come to rue the day."

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Been There, Done That

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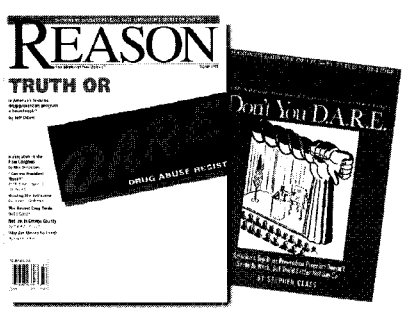

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On the Nature of Civil Society

CHARLES K. ROWLEY

The collapse of the Soviet Empire and the efforts made in Central and Eastern European countries to construct or reconstruct civil society as the salvation of their nations have inspired Western intellectuals to reconsider the concept of civil society and to ask whether it may also help us to understand the condition of Western societies. In both cases, the crisis of socialism, as an ideology and as a practical experience, has proved to be the fulcrum of this search for alternative concepts. For the most part, the concept of civil society is viewed by those active in its renaissance as an attractive combination of domestic pluralism and a continuing role for extensive state regulation and guidance. As such, it offers a broad tent capable of sheltering a multitude of diverse political systems. So broad indeed is this tent that it may be defined more appropriately as an *empty shell* (Rowley 1996, 6).

In this article, I shall review briefly the history of the concept of civil society and evaluate its relevance for classical liberal political economy. I shall suggest that the concept of civil society advanced by John Locke, the young John Stuart Mill, and other like-minded classical liberal scholars best encapsulates the classical ideal and provides an intellectually rigorous basis for defining the appropriate role of government, for protecting individual liberties, and for stimulating those private associations of individual citizens, all of which, in combination, constitute the fundamental basis for human flourishing and the wealth of nations.

The Concept of Civil Society in Historical Perspective

Until the end of the eighteenth century, the term "civil society" was synonymous with the state or political society. In this respect, the term reflected precisely its classical

Charles K. Rowley is a professor of economics at George Mason University and General Director of The Locke Institute.

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origins as a translation of Aristotle's *Koinonia politike* or of Cicero's *societas civilis*. In this conception, civil society expresses the growth of civilization to the point where society is civilized as classically expressed in the Athenian polis or the Roman republic. It represents a social order of citizenship in which men (more rarely women) regulated their relationships and settled their disputes according to a system of laws, where civility reigned, and where citizens took an active part in public life (Kumar 1993, 377; Ferguson 1991; Roepke 1996).

Following directly in this tradition, John Locke (1690) employed civil government as a synonym for civil or political society, Kant defined *bürgerliche Gesellschaft* as that constitutional state toward which political evolution tends, and Rousseau defined the *état civil* simply as the state. In all these usages, civil society is contrasted with the uncivilized condition of humanity in a hypothetical state of nature or under an unnatural system of government that rules by despotic decree rather than by laws.

In *Democracy in America*, Alexis de Tocqueville narrowed the concept of civil society along sociological lines by delineating three realms of society. First, there is the state, which comprises the system of formal political representation, with its parliamentary assemblies, courts, bureaucracies, police, and army. Second, there is civil society, which essentially comprises the system of private and economic interests. Third, there is political society with its political associations such as local government, juries, and political parties and its civil associations such as churches, schools, scientific societies, and commercial organizations.

The life of all these associations, the "super-abundant force and energy" they contribute to the body politic, constitutes political society. Political society supplies "the independent eye of society" that exercises surveillance over the state. It educates us for politics, tempers our passions, and curbs the unmitigated pursuit of private self-interest.

In the postcommunist order, Tocqueville's third category, political society, has become the principal fulcrum for the reconstructed concept of civil society. The tendency has been for ex-Marxists and non-Marxists alike to stress the specifically non-economic and nonstate dimensions of civil society and to focus attention on civic, cultural, educational, religious, and other organizations operating at the periphery of the capitalist system, yet essentially autonomous from the state itself.

In a sense, this preoccupation is entirely understandable, though misguided, among the intellectuals of Central and Eastern Europe, where prior to 1989 the elevation of civil society was perceived not as constituting a new relationship between state and society but rather as an uncoupling of that relationship. Because the state could not be effectively challenged, it was to be ignored. The supporters of civil society aspired to make it an alternative society, a parallel society coexisting for the time being with a delegitimized and weakened official state (Kumar 1993, 386). Nothing better illustrated this parallel than Solidarity in Poland, which remained cohesive from the late 1970s until the collapse of communism but thereafter fragmented into sectorial

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squabbles and personal rivalries and became incapable of evolving the institutions necessary for a safe transition to constitutional democracy.

In no small part because intellectuals had evaluated civil society above the state, viewing it as the solution to all problems accumulated by socialism, they evinced a serious lack of concern after 1989 with regard to the reconstitution of the state and the private economy from the broader perspective of civil society in its classical conception. This lack of concern was especially serious (Klaus 1996) because communism was not defeated but simply collapsed, leaving weak and inefficient markets and weak and inefficient democracies, conditions that continue to plague the entire postcommunist order, the Czech Republic included. As Tocqueville noted, politics spreads "the general habit and taste for association," not vice versa. In the absence of an appropriately formulated polity, civil society in both its broad classical sense and its narrow late-twentieth-century conception simply will not exist.

Much less excusable, and at least equally misguided, has been the post-1989 reaction of too many Western intellectuals. By claiming "the end of history" (Fukuyama 1992) and assuming too easily that the collapse of communism implied the success of U.S.-style capitalism, the large majority of Western intellectuals forgot the maxim that "eternal vigilance is the price of liberty" and focused attention excessively on the resurrection of civil society in the narrow "political association" sense of Tocqueville.

By inferring the final victory of democracy and capitalism over autocracy and socialism, these Western intellectuals proclaimed, at least implicitly, that any preoccupation with classical political economy was unnecessary and suggested instead that the results of majoritarian democracy represented the highest level of politicoeconomic achievement (Nozick 1989; Gray 1989, 1993). These judgments were (and are) misguided.

Certainly the free society rests upon and is intended to nurture a solid foundation of competent, self-governing citizens, fully capable of and personally responsible for making the major political, economic, and moral decisions that shape their own lives and those of their children. Certainly, such personal qualities are nurtured and passed on to future generations by healthy families, churches, neighborhoods, voluntary associations, and schools, all of which provide training in, and room for, the exercise of genuine citizenship. Certainly, this expansive understanding of citizenship is challenged in the late-twentieth-century United States, as it was not when Tocqueville wrote *Democracy in America,* by contemporary forces and ideas that regard individuals as passive and helpless victims of powerful external forces.

It is a fundamental error, however, to assume that these contemporary forces and ideas are exogenous elements of the state of nature to be counteracted by some narrow retreat into civil society or by some program that seeks directly to reinvigorate and to reempower the traditional local institutions that provide the environment for the exercise of genuine citizenship. In truth, the forces and ideas that now erode good citizenship emanate from the consequences of an ill-directed twentieth-century politi-

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cal economy, not from any neglect of civil society in its narrow late-twentieth-century form.

Before Resorting to Politics

"Why does anyone want to resort to politics, and why does anyone put one kind of political order above another?" Anthony de Jasay (1996) suggests that those who are both very earthy and very frank approve the political order that they believe is doing the most good for them. Such a "grand criterion" of political hedonism has no prospect of generating basic agreement about the respective merits and consequences of political systems except for the lowest common denominator of democracy, namely, the shared redistributive advantage of a winning over a losing coalition.

What is true in this crude and obvious way about the system of political hedonism in which the state caters to some interests and neglects others is also true, if less conspicuously, about any other political order that fosters one value and neglects others. Not all values are compatible; most compete with one another. A political order reveals a hierarchy of values by what it promotes and demotes, by the marginal rates of substitution between them that it establishes through policy interventions.

Predictably, the value-orientated political order will be an imperfect match for those who live within it if the citizens are heterogeneous with respect to the values they uphold. No discernible mechanism would make global choice coincide with the best available choice of each individual consistent with the best available choice of every other—the equilibrium condition of ordered anarchy. Value neutrality, where there is not too much of one thing and too little of another, can be achieved by individuals for themselves, but not by a political order for many, let alone for everybody (Jasay 1996, 5).

Jasay (1996, 7) notes the pronounced danger for the equilibrium condition of ordered anarchy posed by the narrow consequentialism of utilitarian philosophy when promoted through the political process. Within the logic of consequentialist ethics it is all but incoherent to want to limit the scope of government. Limiting government on purpose would be rational only if the scope for doing good were itself limited, which no doubt it is not.

Yet the utilitarian ethic as deployed in its late-twentieth-century form ignores its own value judgment, namely, the impossibility of comparing utilities across individuals. If alternatives are incommensurate, no balance can be struck between the good and the bad consequence, and consequential reasoning is simply out of place. This difficulty leads Jasay (1996, 10) to deploy his first warning to those who would resort to consequentialist politics: *first, avoid doing harm.*

In this view, a political authority simply is not entitled to employ its power of coercion for imposing value choices on society. Its sole guiding principle in all such

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cases can only be: *when in doubt, abstain*. This principle can be applied retrospectively to dismantle polities that have become suffused with consequentialist ethics as well as prospectively, in the state of nature, to prevent such a suffusion from ever occurring.

One implication of this guiding principle for political ethics is that applying coercion is legitimate only when it is positively invited by those who will be coerced. Assuming that property rights are given, the only circumstances in which rational individuals might choose coercion would be if transaction costs, default, and free-rider and hold-out temptations obstructed the solution of bargaining problems. In such circumstances, Jasay, (1996, 7) suggests that hypothetical invitations to be coerced have no better standing than hypothetical contracts. Those who will be coerced must actually invite coercion. Only then do certain tasks become duties that the state must assume.

Circumstances endow each individual with a set of actions that are feasible from a material perspective. Some of these actions are inadmissible because they would harm others in a way that would constitute a tort by the conventional norms of the society. Other actions are inadmissible because individuals have contracted with others not to choose them. To choose such actions would constitute a default or a breach of an obligation. Every other feasible act is admissible (Jasay 1996, 29–30).

With torts and obligations taken care of, the set of admissible actions becomes a residual. Harm and obligations together constitute the full set of valid objections, establishing a strong presumption that all other actions should be allowed.

Coercion by the state fits well into this categorization of feasible actions. Applied to the inadmissible subset, coercion functions to deter tortious harms and contract breaches. State coercion applied to the admissible subset of actions prima facie is illegitimate. It deforms the value of rights and liberties by threatening or committing a tort (in principle, if not by social convention). Only by the explicit invitation of those who are coerced can this presumption conceivably be overruled. Doubt about an issue creates a presumption to abstain from resolving it by state coercion (Jasay 1996, 54).

Of Property

For those who accept this delineation of the role of politics, the twentieth-century view that notions of fairness call upon the state to play a deliberately redistributive role seems mistaken. Redistributive politics clearly creates gainers and losers. Therefore, it necessitates a balancing of the good of some and the bad of others. If such a balancing is ruled inadmissible, redistribution cannot serve as a warrant for the use of coercion. If consequentialism is disallowed, politics can play no legitimate role with regard to redistribution.

Fundamental to this thesis is the presumption that property is partitioned before resorting to politics, that it is not some common-pool resource the use of which and

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the partitioning of which remain permanently under the control of the political process. This presumption runs counter to late-twentieth-century practice, which emphasizes a redistributionist ideology. The only difference between this redistributionist ideology and socialism is that the former still pays lip service to efficiency gains and accepts on consequentialist grounds some limited version of the exclusion principle implied by private property, whereas the latter does not. The tragedy of the commons overhangs all societies in which property is not strictly partitioned among private individuals, quite independently of whether such societies are redistributionist or socialist, autocratic or democratic.

In the view of John Locke ([1690] 1991), even prior to the social contract that establishes political or civil society, every individual has a property in his own person and a right to the product of his own labor. In addition, individuals create property rights out of the common pool of available resources by mixing their labor with such resources and thereby annexing them. These rights are natural rights, at least if the Lockean proviso is satisfied:

> Whatsoever then he moves out of the State that Nature hath provided and left it in, he hath mixed his *labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the labourer, no Man but he can have a right to what that is joyned to, at least where there is enough and as good left in common for others. (288)

It is important to note that this natural right to property is not an inalienable right, at least in the sense I shall outline. For this reason the United States founders, who were influenced greatly by Locke's writings, failed to list property as one of the inalienable rights in the preamble to the Constitution. If we define an inalienable right as a right that cannot be lost in any way, then such a right would incorporate both a disability and an immunity: the possessor of the right would not be able to dispose of it voluntarily or involuntarily, nor would any other person, group, or institution be able to dispossess him of it. Property clearly does not fall into this category of a right, as it can be given away or exchanged voluntarily (*alienated*) and it can be lost involuntarily through negligence or wrongdoing (*forfeited*).

The natural right to property does imply, however, that it cannot be taken away by some other party, including a government (*prescribed*). In this sense, we may denote the natural right to property as an *imprescriptible right*. What revolutionary authors such as Locke had in mind was not that no government could take away the right to property but rather no state legitimately could take away this right without the owners' consent. The force of this claim can be appreciated only when we remember

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that Locke wrote his *Treatises* under the influence of contractarian accounts of government authority (Simmons 1993, 107).

> The Supreme Court cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have property,* without which they must be suppos'd to lose that by entering into Society which was the end for which they entered into it, too gross an absurdity for any Man to own. (Locke [1690] 1991, 360)

The Lockean assertion that each individual is born free in the state of nature correctly recognizes that we are not born into political communities. We are not naturally citizens; we must do something to become citizens. Locke clearly depicted the state of nature as one of "*perfect freedom* to order their Actions, and dispose of their Possessions, and Persons, as they think fit, within the bounds of the law of Nature, without asking leave, or depending on the Will of any other Man" (bk. 2, para. 4). The state of nature has a law to govern it, which obliges every individual: no individual "ought to harm another in his Life, Health, Liberty or Possessions" (bk 2, para. 6).

The law of nature essentially reflects the moral claim of each individual to negative freedom and the duty and responsibility of each individual to respect the negative freedoms of all others. To this end, each individual has an executive power to punish transgressors of the law of nature "to such a Degree as may hinder its Violation" (bk. 2, para. 7). Indeed, those who transgress the law of nature to a sufficient degree may forfeit their own rights to life, liberty, and property. Only the constant danger of the degeneration of the state of nature into a state of war leads individuals to commit to a social contract that creates civil society and to a limited government entrusted with the executive authority to preserve and protect their natural rights.

Civil societies and governments do not possess rights naturally; only individuals do. By agreeing to leave the state of nature and enter into civil society, individuals necessarily sacrifice their right to judge and punish breaches of their natural rights by others. This is no small sacrifice and will not be countenanced unless civil or political society is strictly limited with respect to the powers it exercises. With respect to natural rights of individuals to life and liberty, Locke implied that persons cannot make transfers to government even by consent, for these rights are inalienable. With respect to the natural right to property, individuals can make transfers to government by consent, for these rights are not inalienable. Individuals cannot legitimately have these rights taken without consent (except perhaps by forfeiture), because these rights are imprescriptable.

Although Locke viewed natural rights essentially as a gift from God, he justified the natural right to private property primarily on utilitarian grounds, rejecting Robert

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Filmer's argument that original communism could not give way to private property without the universal consent of mankind:

> God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational... not to the Fancy or Covetousness of the Quarrelsome and Contentious. (bk. 2, para. 34)

Locke's theory of first possession as the fundamental basis for property rights offers an essentially utilitarian justification for privatizing the initially common gift from God on a basis that confirms a clear-cut route to the determination of title. Because his focus naturally was on land, he was overly concerned to condition privatization by the proviso that "there is enough, and as good left in common for others" (bk. 2, para. 27). In countries where available land has been largely privatized, this proviso may seem to threaten the natural-right proposition, even to lend succor to socialism.

Such an interpretation, however, is incorrect. The modern theory of property rights concerns itself more with legitimate exploitation of opportunities than with the narrow concept of ownership focused on by Locke. If "the right to property is a right to action" (Rand 1961, 94), a theory of property rights relates much more to the intellectual and physical efforts of individuals than to a common stock of assets. Property rights concern allowable acts of transformation of the material world among which individuals possessing such rights are free to choose.

Because property is created largely through an act of transformation rather than a circumstance of possession, the Lockean proviso seemingly is moot. For there can never be "enough and as good" left for others if every action issues in a unique transformation (Rasmussen and Den Uyl 1991, 120). Acts of transformation under conditions of original acquisition are not rights-violating, because no one has rights to the pretransformed objects under consideration. (I shall argue later that this concept of property rights has powerful implications for the nature of civil society.)

For those who do not subscribe to Locke's notion of a natural right, Jasay (1996) outlines an alternative notion that is fully compatible with Locke's first-possession commitment. Jasay's defense of the first-possession rule is general and unambiguous. If an individual is in a position to take first possession, then such a taking is admissible if it does not constitute a tort (trespass) and if it violates no antecedent right (the case by definition). In such circumstances, taking exclusive possession is a liberty that can be obstructed only by a contrary right, which does not exist.

Two alternative acts constitute an appropriation that vests ownership in the performer, namely, (1) finding and keeping and (2) enclosure. Because the right to property is the fulcrum of a civil society, it is worthwhile to review briefly each of these

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constitutive acts. Accepting the notion of finding and keeping as the basis for property rights involves respecting the moral arbitrariness of luck. Redress then cannot be called for on moral grounds. Any judgment that the resulting distribution of wealth is right or wrong involves a category mistake by reference to the finding-and-keeping rule. Finding and keeping poses no question of justice and creates no liability to compensate or redress.

Suppose alternatively that the potentially useful resource is there for all to see—neither chance nor finding cost is required to realize its existence—yet it has not been appropriated. Any squatter can establish first possession by enclosing it, thus excluding everyone else's access to it. However, in this case, the analogy with finding is incomplete, because those who used to enjoy access to the resource are now denied such access.

The enclosure worsens their situation even though it does not violate their rights. If the unowned resource has been used regularly by identifiable individuals, common-pool ownership may be implied, and these individuals should be paid compensation in the form of reliance-based damages. Enclosure itself is not a tort. It constitutes a clash of two liberties, not a clash of liberty and a right. If exclusion is successful and just claims for compensation on grounds of reliance are satisfied, the resource passes legitimately into the ownership of the finder-encloser.

The Law of Nature and Human Flourishing

The state of nature, as earlier defined, is not a state of license, even though people in that state have an uncontrollable liberty to dispose of their property. The state of nature has a law of nature to govern it, which obliges everyone (Locke [1690] 1991, bk. 2, para. 6). As every individual is equal and independent under that law, no one ought to harm another in his life, liberty, or possessions. In the state of nature, the law of nature provides that every man has a right to punish the transgressions of that law to such a degree as may hinder its violation. All who are damaged by the unlawful act have a particular right to seek reparation from the transgressor. In this sense, every individual has executive power in the state of nature.

Because men are free, equal, and independent by nature, no one can be subjected to the political power of another without his own consent. Why would people give such consent? Locke's answer is that although in the state of nature men have such rights, the enjoyment of them is uncertain and constantly exposed to the invasion of others (Locke [1690] 1991, bk. 2, para. 123). People create civil society mainly for the mutual preservation of their lives, liberties, and estates, which Locke calls by the general name *property*.

Although man gives up the executive power to protect his own property when he enters into civil society, he does so only to better preserve his property. The power of civil society is constrained to secure everyone's property by providing against the de-

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fects inherent in the state of nature. Even if, as Locke supposed, majority rule governs society, it does so subject to the strict requirement that every man's life, liberty, and estates must be protected at least as well as he could protect them in the state of nature. Evidently, such an outcome can be achieved only by the *minimal state*, that which exists solely to determine and defend property rights against potential internal and external aggression. Note that this definition of the minimal state permits a state whose size may vary according to the nature and scale of the forces of aggression it is obligated to resist.

I shall now argue that human flourishing occurs best in the environment provided by the minimal state; that political societies composed of individuals with diverse interests predictably stifle human flourishing unless the state takes no action except to uphold the negative natural rights of all citizens. This argument follows in the lineage of classical liberal scholars perhaps best epitomized by John Locke ([1690] 1991), Wilhelm von Humboldt ([1791] 1969), and John Stuart Mill ([1859] 1989).

It is instructive to initiate this analysis of human flourishing with Aristotle's concept of *eudaimonia,* which describes a state of individual well-being induced by living rationally or intelligently and characterized by self-actualization and maturation. Use of the term eudaimonia in no sense implies an endorsement of Aristotle's ethics, which does not embrace the notions of natural rights and individual liberty central to this article.

Although eudaimonia is usually translated as "happiness," this is misleading if not qualified. Here, happiness should be understood not simply as the gratification of desire, but rather as the satisfaction of right desire—the desires and wants that will lead to successful human living (Rasmussen and Den Uyl 1991, 36). Of course, man is not only a rational being but also an animal with the biological capacity and need for sensory experiences. Emotions play a significant role in achieving eudaimonia. Nevertheless, human flourishing requires that the emotions be controlled by man's capacity to reason. For a successful life, man must live so that he achieves goals that are rational for him not only from an individual perspective but also as a human being (Machan 1975, 75). In so doing he controls his animal passions.

In a society of diverse individuals, the outcomes of human flourishing will reflect that diversity. Human flourishing is unlikely to lead to a consensus about the good, despite much modern consequentialist reasoning to the contrary. Value pluralism, which so concerns conservatives and communitarians, will be dealt with later, and I shall argue that it constitutes a problem only within the context of the nonminimal state.

Human flourishing or eudaimonia must be attained through a person's own efforts. It cannot be achieved as the result of forces beyond his control. If a human is to flourish, the cardinal virtue is rationality, which can develop only when an individual has full responsibility for his own choices. Individuals cannot flourish or grow when others make choices for them or when they are not held responsible for the choices

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they make, because the human faculties of perception, judgment, mental activity, and even moral preference are exercised only in making a choice:

> He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? It really is of importance, not only what men do, but also what manner of men they are that do it. (Mill [1859] 1989, 59)

Of course, the laws of nature do not guarantee that every human being will flourish. Some will not seize the opportunity provided by liberty to fulfill their lives to the limit of their respective capacities. Many will evade the burdens and constraints of choice and make their way in life through imitation or servitude rather than creativity. Others will be overwhelmed by their passions, discarding rationality in favor of purely sensory pleasures. The laws of nature offer only opportunities, not a guarantee of utopia. They also protect individuals from the choices by others that threaten their lives, liberties, or property. The freedom to flourish is not a license to behave in ways injurious (in this sense) to others. Fundamentally, the law of property, of contract, and of tort, effectively enforced, would control the injurious impulses incidental to human flourishing.

In the Lockean tradition of negative natural rights, the natural right to private property arguably is its most controversial component. This controversy extends to the relationship between property rights and human flourishing (Rawls 1971). This relationship, therefore, requires particular attention. Individuals are material beings, not, as Rawls supposes, disembodied ghosts. Being self-directed or autonomous is not some psychic state but pertains to actions in the real world and often involves material resources. By using and manipulating material resources, autonomous individuals, in large part, develop and exercise their creativity under conditions of liberty.

For individuals to flourish, they need to maintain control of what they have produced (Buchanan 1993; Rasmussen and Den Uyl 1991, 116) and to retain or dispense their accumulated resources according to their own judgment. In this respect, the imprescriptible right to property takes its full place with the inalienable rights to life and liberty as the strongest foundation for human flourishing.

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The Nonproblem of Value Pluralism

John Gray (1989, 1993) has argued for what he calls *plural realism in ethics* along the following lines: because there are definite limits on the varieties of human flourishing and there are many forms of social life, often involving divergent and uncombinable goods, in which human beings may flourish, no one form is the one right way of life for man. Plural realism thus differs sharply from Aristotelian ethics, which claims that the one best form of life for the human species can be rationally discovered. Plural realists, in contrast, argue that human well-being can be realized in many, diverse, and incompatible forms of social life. With this assessment I have no quarrel; indeed it is the essence of the political philosophies of both Locke and Mill (Waltzer 1994).

Gray (1993), however, deploys plural realism as a weapon to attack classical liberal ethics, most certainly the brand of ethics I have advanced in this article. He claims that pluralism fells classical liberal meliorism, which ranks societies by the degree to which they approximate a classical liberal order; that it overwhelms the notion that all human beings are endowed with rights, because highly stratified societies may give rise to some form of human flourishing; that it destroys Kant's notion that only persons have intrinsic value, because elements of a "rich cultural environment" may enter into autonomous choice constitutively rather than instrumentally.

In passing this judgment, Gray lays claim to intellectual support from Isaiah Berlin, in his view the most compelling liberal political philosopher of the twentieth century (Gray 1996). At the heart of Berlin's thought, he claims, is value pluralism, an idea of enormous subversive force. If there is no single master-value and some values are not necessarily compatible or harmonious, no single moral theory can guide our conduct when we face moral dilemmas that force us to forsake one good for another. No metric enables us to make trade-offs. In such circumstances, classical liberal institutions have no universal authority.

Whether Gray is accurate in his reflections on Berlin—and there is a lot of evidence that Berlin is a fox who knows many things rather than a hedgehog who knows one big thing (Kukathos 1996)—he wields these reflections to attack classical liberal political orders, arguing that they have no general superiority. In Gray's view, value pluralism dictates pluralism in political regimes and undermines the claim that only classical liberal regimes are fully legitimate. Gray finds a wide range of past and present societies that are far distant in nature from classical liberal orders to be compatible with his concept of civil society.

In my view, the argument from value pluralism strengthens rather than weakens the case for a political society grounded either on the law of nature or, equivalently, on Jasay's maxims set out in *Before Resorting to Politics* (1996). For only in such a society, where the negative rights of individuals are strictly enforced, will value pluralism withstand public-choice pressures to conform either to the values of transient majorities or to the dictates of an autocrat. In his critique of classical liberal political orders, Gray

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falls into a categorical error of assuming that the whole of society is politicized, that the supposed monism of classical liberal values will be imposed on all aspects of an individual's life.

This assumption is not the case. By definition, a classical liberal order constrains politics to its minimal form, leaving individuals free to form their own associations and groups and to pursue their own goals subject only to the laws of property, contract, and tort, uninhibited by political pressures. Ultimately it leaves individuals free even to abandon the order itself should they so choose. Classical liberals will not force individuals to be free (Rowley and Peacock 1975). Citizens who flourish within the framework of classical liberalism, however, will not easily choose to deny themselves the advantages they enjoy.

A Flawed Concept of Civil Society

Gray (1993) claims that classical liberalism, as a doctrine taken to have universal prescriptive authority, is dead; its philosophical foundations are in a state of collapse. All that remains is "the historic inheritance of civil society that has now spread *to most parts of the world*" (314). Civil society, as defined by Gray, superficially conforms with the basic tenets of a classical liberal order, although on a closer examination this conformity is discovered to be a mirage.

By civil society, Gray (1993) means a number of things. First, it is a society tolerant of the diversity of views, religious and political, that it contains and in which the state does not seek to impose any comprehensive doctrine. In this sense, Calvin's Geneva was not a civil society, nor were any of the societies characterized by twentieth-century totalitarianism.

Second, it is a society in which both government and individual citizens (Gray significantly refers to them as its subjects) are restrained in their conduct by a rule of law. A state in which the will of the ruler is the law cannot contain a civil society. In consequence, civil society presupposes an omnipotent but limited government.

Third, civil society is characterized by the institution of private property. Societies in which property is vested in tribes or most assets are owned or controlled by governments cannot be civil societies. Private property is defended as an enabling device whereby individuals with radically different goals can pursue such goals without recourse to a collective decision-procedure that must be highly conflictual. Private property, in Gray's view, is compatible with a wide range of political institutions.

These institutions need not conform to classical liberal predilections. Nor need they contain the culture of individualism. Nor need they embrace the institution of market capitalism, which in Gray's opinion is not the only market institution compatible with private property. In Russia and Japan, for example, municipal, village, and cooperative forms of property ownership are likely to prove greatly superior to the capitalist form (Gray 1993, 316).

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The criteria set out by Gray as the defining characteristics of civil society are capable of defining a narrow or a broad tent, depending on how the words are interpreted. By his selection of societies he categorizes as civil societies, Gray unequivocally chooses the broad-tent definition. The societies of North America and Western Europe clearly qualify, although Gray is not uncritical of the growth of government in these countries, especially during the second half of the twentieth century. One senses that something is seriously awry, however, when Gray (1993) adds to this list of civil societies a range of past and present political orders radically different from the great democracies: Czarist Russia, Meiji Japan, Bismarckian Prussia, Duvalier's Haiti, Singapore, Hong Kong, South Korea, and Taiwan. None of these has demonstrated great tolerance for diversity of opinions and lifestyles; none has provided great security for private property rights, recent indexes of economic freedom (Gwartney, Lawson, and Block 1996) notwithstanding; and none has protected the lives and liberties of citizens by restricting government through any recognizable rule of law enforced by an independent judiciary.

It would be easy to take advantage of Gray's poor judgment to ridicule the concept of civil society advanced in his recent writings. It is more instructive, however, to review a stronger contestant for his lists in order to demonstrate the flawed nature of his broad concept. Certainly many of the citizens of the United States claim preeminence for their political order as the leading example of civil society in the modern world. The concept of the new world order advanced by Presidents Bush and Clinton essentially involves a commitment to reshaping all nations in the American image. Evaluated by the criteria of classical liberalism, however, the United States is not now a civil society, although it probably was at its founding in 1787 except for the evil institution of slavery.

In the late twentieth century, the United States has the highest murder rate of all advanced nations; clearly it is not protecting the lives of its citizens. It also has the highest incarceration rate of all advanced nations, as a consequence of extremely interventionist legislation and administrative regulations that further erode the liberties of its nonincarcerated citizens. Its taxes and regulations significantly encroach on the private property rights of its citizens, and its takings of private property for public use in no sense honor the wording of the Fifth Amendment to the Constitution. There is no imprescriptible right to property in the United States.

These characteristics are no accident of fate. They are entirely predictable consequences of the expansion of government beyond the limits of the minimal state, of the abandonment of either natural rights or Jasay's maxims "before resorting to politics." In many ways Tocqueville anticipated the likely regression of American democracy away from liberty and civil society and toward equality and noncivil society in volume 2 of *Democracy in America*.

Tocqueville warned that "the type of oppression which threatens democracies is different from anything that has ever been in the world before" ([1840] 1969, 691).

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He envisaged "an innumerable multitude of men, alike and equal, consistently circling around in pursuit of the petty and banal pleasures with which they glut their souls" (692). In such a society, a man "exists in and for himself, and though he may still have a family, one can at least say that he has not got a fatherland" (692). In a prophetic passage, Tocqueville sets out the implications for the political order of this state of affairs:

> Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. It would resemble parental authority if, fatherlike, it tried to prepare its charges for a man's life, but on the contrary, it only tries to keep them in perpetual childhood. . . . It provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, makes rules for their testaments, and divides their inheritances. Why should it not entirely relieve them from the trouble of thinking and all the cares of living? (692)

The process of subjugation of such a population is subtle rather than brutal as in totalitarian orders:

> It does not break men's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd. (692)

Much of what Tocqueville feared in 1840 for democracy in America has come to pass with consequences for civil society that manifest themselves in high crime rates, high rates of incarceration, a cult of property theft by middle-income groups through the process of government, and a decline in thrift, manliness, civility, toleration, duty, self-sacrifice, service, fidelity, self-control, fortitude, honesty, honor, trust, mutual respect, diligence, discretion, and self-improvement (Anderson 1992).

For the most part, these qualities of civil society may seem more psychological and sociological than economic. My central hypothesis is that they depend not on the perfectibility of man but on sound political economy as enunciated by the great classical liberal scholars whose ideas form the basis of this article. These lost values will return, if at all, only through a return to the minimal state obligated to preserve and protect the lives, liberties, and properties of the citizens who create and effectively control it. Only in such a society will human beings flourish and assume for themselves duties and obligations they have currently abandoned in an ever-escalating demand for unjustified rights and privileges.

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The Restoration of Civil Society

In his *History of the Decline and Fall of the Roman Empire* ([1787] 1974), Edward Gibbon describes the gradual emergence and consolidation of classical civil society throughout the Roman Empire over some six hundred years during the period of the Great Republic (SPQR). He chronicles the disastrous consequences of monarchy and the collapse of SPQR following the assassination of Julius Caesar, the subsequent civil war between Octavianus Caesar and Marc Antony, the final victory of the former at the battle of Actium (34 B.C.), and the crowning of Octavianus as the Emperor Augustus Caesar. He relates the slow but inexorable decline and fall of this once great empire during the following several centuries as it was ravaged from within by internecine battles for the Imperial Crown, always involving the Praetorian Guard and the Roman Legions, and from without by the barbarian hordes waiting at the boundaries for any perceived weakening of imperial resolve.

Following the final collapse, "the greatest, perhaps, and most awful scene in the history of mankind" (Gibbon [1787] 1974, 6:2441), the institutions of civil society disappeared completely for the greater part of a millennium. Later Great Britain freed itself from the Stuart dynasty in 1688 and accelerated the slow process of evolution of the institutions of civil society, which eventually were to extend far beyond its own frontiers to encompass much, although by no means all, of its own extensive empire. The twentieth century has witnessed the decline and fall of the British Empire and, with it, the erosion of classical liberal civil society, ravaged alike by two world wars and the follies of unlimited democracy. If this process of erosion is not checked, a new Dark Age beckons from which, given the destructive power of modern weaponry, mankind is unlikely to reemerge.

Now that government has grown so large, both in absolute size and in the range of its functions, in all Western nations, the public-choice constraints obstructing any rapid return to the minimal state are formidable. The advance of the welfare state has created a culture of dependency that manifests itself at the polls even as it corrodes human flourishing among the individuals addicted to its offerings. The politicization of society that accompanies the growth of government has essentially destroyed the rule of law and, in doing so, has weakened the protection accorded the lives, liberties, and property of individual citizens. This weakening of protection, in turn, has curtailed human flourishing even among the more independent individuals in society, lowering the degree of vigilance on which the law of nature depends for its continued existence.

In such circumstances, public-choice predictions for the restoration of the minimal state are less than propitious. Without the minimal state, the prospects for the restoration of civil society are as bleak as they were in the dying years of the Roman Empire.

It is instructive in this regard to switch attention from the fundamental characteristics of classical civil society as outlined in this article to the complex of interlocking institutions and individual dispositions on which civil society may be expected to flourish

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in a twenty-first-century environment. Insights are available concerning these interrelationships from the experience of Great Britain during the late eighteenth and early nineteenth centuries. The freedom of British citizens at that time stemmed, as Michael Oakeshott (1991) has noted, not from separate rights, laws, or institutions but from many mutually reinforcing liberties:

> It springs neither from the separation of church and state, nor from the rule of law, nor from private property, nor from parliamentary government, nor from the writ of *habeas corpus,* nor from the independence of the judiciary, nor from any one of the thousand other devices and arrangements and characteristics of our society, but from what each signifies and represents, namely, the absence from our society of overwhelming concentrations of power. (Oakeshott 1992, 387)

In this perspective, individuals considered themselves free in classical-liberal Britain because no one was allowed unlimited power—no leader, faction, party, government, church, corporation, trade or professional association, or trade union. Instead, power was diffused through what Oakeshott refers to as a *civil association* in which each individual acknowledges the authority in which he lives. Respect for the authority of law did not imply that every individual supported every law. The law itself was a slowly changing spontaneous order (Hayek 1973) that garnered respect not just for what it was but also for what it promised to become, always within the framework of the rule of law. In a civil association, the government "is an instrument of the people, charged with keeping in good order the institutions which allow people to pursue their self-chosen ideals" (Green 1993, 9).

The twentieth century has witnessed major retreats by all such civil associations as illiberal nation states have abandoned the minimal state and have reconstituted their citizens into what Oakeshott (1991) refers to as *enterprise associations.* Nation-states constituted as enterprise associations are composed of individuals related by their pursuit of a common interest or objective. There is but one sovereign purpose. The task of leaders "is to manage the pursuit of this goal and to direct individuals as appropriate" (Green 1993, 8). Communism and national socialism were ultimate forms of the enterprise association. However, late-twentieth-century social democracy has evolved as a less extreme form of this perversion of the civil association, unfortunately much better entrenched than either of its totalitarian close relations.

Hayek (1973) has demonstrated that the classical-liberal experiment with democracy failed because the institutions chosen to preserve liberty proved inadequate. In particular, faith placed in the separation of powers—legislative, executive, and judicial—was not justified even in the most sophisticated experiment, the United States Constitution.

The U.S. Supreme Court, although equal in status to the Congress and the president, had been designated as the crucial check against politicization of the law. It

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played this role effectively until, in 1937, a majority of its justices rendered themselves unlawful in the case of *West Coast Hotel Co. v. Parrish,* caving in to pressures from the White House to subvert the Constitution in favor of unconstitutional New Deal legislation. Thereafter, periodic coalitions between Congress and presidents effectively destroyed the separation of powers and the rule of law.

In large part, classical liberal scholars underestimated the capacity of the state to subvert society by shifting it from the civil to the enterprise association because they failed to anticipate the shift from the law of *Nomos* to the law of *Thesis,* from the common law to law making by the state (Hayek 1973). The idea that the law was immune from interference by government, that it was discovered and not made, was fundamental to natural law, or the law of God, indeed was the fundamental contribution of Judeo-Christian religion to the seventeenth- and eighteenth-century concept of civil society. That view was swept away by the extension of the franchise in the nineteenth and early twentieth centuries and the philistinization of the majority vote in most advanced democracies.

What was swept away had taken many generations to evolve. It cannot be reestablished by constitutional decree but only by another slow process of evolution. From a public-choice perspective, such an evolutionary process faces formidable obstacles in the form of special interests that control the enterprise association. In a civil association, the law must not be the instrument of special interests nor the tool of government. It must constitute a body of moral and prudential rules binding on everyone (Green 1993, 122). How can law making be restored as the making of impartial rules of just conduct in an environment subverted by the forces of public choice? How can it be established in environments that have never experienced the rule of law?

One route to such reform is the weakening of central government through a process of devolving power (including the power to tax) to the states or provinces in a federalist system or to the local level in nonfederalist systems. In and of itself, such devolution does not guarantee a shift away from Leviathan in favor of the minimal state. In some instances, where the population is highly dependent on the state, devolution may shift the balance even further in favor of Leviathan.

Nevertheless, locally ruled communities would then be free to experiment (at their own cost) with differing forms of government. To the extent that such experimentation steers clear of contamination by the spending and taxing interventions of central government, communities that are more successful in encouraging human flourishing signal the existence of a better way to those that are less successful. Given the powerful forces ranged against such reforms by the central government, if civil associations are once again to replace enterprise associations, devolved competition may be the only feasible mechanism.

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Benjamin Tucker, *Liberty*, and Individualist Anarchism

WENDY MCELROY

"Liberty, Equality, Fraternity, these three; but the greatest of these is Liberty. Formerly the price of Liberty was eternal vigilance, but now it can be had for fifty cents a year." So wrote Benjamin Ricketson Tucker (1854–1939) on the first page of the first issue of *Liberty*.[1]

The American periodical *Liberty*,[2] edited and published by Tucker from August 1881 to April 1908, is widely considered to be the finest individualist-anarchist periodical ever published in the English language. Over its twenty-seven-year life span, during which it issued first from Boston and then from New York (1892), *Liberty* chronicled the personalities and the shifting controversies of radical individualism in the United States and abroad.

It also fostered those personalities and controversies. The scroll of contributors to *Liberty* reads like an honor roll of nineteenth-century individualism: Lysander Spooner, Auberon Herbert, Joshua K. Ingalls, John Henry Mackay, Victor Yarros, and Wordsworth Donisthorpe are only a partial listing. Speaking with a cosmopolitan and avant-garde voice, *Liberty* also published such items as George Bernard Shaw's first original article to appear in the United States,[3] the first American translated excerpts of Friedrich Nietzsche,[4] and reports from economist Vilfredo Pareto on political conditions in Italy.

1. Tucker (1881a, 1). Representative excerpts from *Liberty* are available in Benjamin R. Tucker (1893) and (1926).

2. The periodical began in a four-page newspaper format and went to an eight-page format on May 17, 1884. It returned to a four-page format on July 25, 1891, varied from sometimes twelve to mostly eight pages from February 24, 1894, until the February 1906 issue, in which Tucker announced a format and publication change that would continue until close to *Liberty*'s last issue in April 1908. "Liberty expects to greet its readers bimonthly hereafter, in the form given to the present issue—a pamphlet of sixty-four pages." During its run, *Liberty* varied from a weekly to a fortnightly and then finally to a monthly schedule.

Wendy McElroy is a research fellow of the Independent Institute.

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Of seminal importance in the history of individualist ideas, Tucker's periodical also served as the main conduit of Stirnerite egoism and of radical Spencerian thought from Europe to America.[5] As such, *Liberty* was both an innovator in individualist theory and a mainstay of that tradition.

The periodical was also remarkable for the consistently high quality of its content and the clarity of its style.The issues debated within its pages have a sophisticated, almost contemporary ring, ranging from radical civil liberties to economic theory, from children's rights to the basis of rent and interest. Contributors to *Liberty*, as well as other individualists who published articles elsewhere, often found themselves on the defensive against Tucker's intransigent demand for "plumb line" consistency in all things.

As a professional journalist,[6] Tucker also insisted on a clear, precise style. He took great pride in raising *Liberty* far above the standards for layout and grammar of most other radical periodicals of the day.

Tucker's Background

Tucker was born on April 17, 1854, in South Dartmouth, Massachusetts.[7] Coming from both a Quaker and a radical Unitarian background, Tucker grew up in an atmosphere of dissent and free inquiry, and attended the Friends Academy in New Bedford, a nearby seaport. At his parents' prompting, he later attended the Massachusetts Institute of Technology in Cambridge, Massachusetts, for three years.

In Boston, Tucker became politically involved in the 1872 presidential campaign of Horace Greeley and made the acquaintance of the veteran individualist anarchists Josiah Warren and William B. Greene through attending a convention of the New England Labor Reform League in Boston, a veritable hotbed of individualists. Greene, who served as the chairman, made an immediate and deeply favorable impression on

3. The article was a critique of Max Nordau's *Degeneration*. Reprints of Shaw's work had appeared earlier. The first such reprint was entitled "What's in a Name?" and appeared in the April 11, 1885, issue only a month after it had appeared in Henry Seymour's British periodical *The Anarchist*.

4. These excerpts were translated by George Schumm at Tucker's request. Tucker wrote: "I believe that my friend George Schumm, to whom I am indebted for the little knowledge of Nietzsche that I have, could either write, or translate from other sources, a much truer account of this new influence in the world of thought. Will he not do so, and thus make Liberty the means of introducing to America another great Egoist?" (*Liberty* 9 [October 1, 1892]: 3).

5. Nineteenth-century "American" anarchism tended to run along different ideological lines depending on whether it was based on native or immigrant thought. The native tradition ran from the writings of Thomas Jefferson and Thomas Paine, through William Lloyd Garrison, Henry David Thoreau, Josiah Warren, William Greene and Lysander Spooner directly to the individualist anarchism of Tucker. The more recent immigrant tradition owed much to the influx especially of German socialists and eventually evolved into communist or socialist anarchism (among other positions).

6. Tucker was an editorial writer for the *Boston Globe* and later for *Engineering Magazine* (New York), although he refused to write articles that might compromise his anarchist principles. He was especially proud of *Liberty*'s typography, on which he expounded at length.

7. Perhaps the best portrait of Tucker, the man, remains Paul Avrich's "Benjamin Tucker and His Daughter" (Avrich 1988, 144–52).

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the young MIT student.[8] The introduction to both Greene and Warren had been facilitated by the abolitionist and labor reformer Ezra Heywood. Tucker would later look back on these initial encounters as the pivotal point in his career as a radical. At the convention, Tucker purchased Greene's book *Mutual Banking* (1850) and Warren's *True Civilization* (1869), along with some of Heywood's pamphlets.

An ongoing association with Heywood, the publisher of the Princeton labor-reform periodical *The Word,* soon followed.[9] From his involvement in the labor-reform movement, Tucker became convinced that economic reform must underlie all other steps toward freedom. From a later admiration of the radical abolitionist Spooner, Tucker's voice acquired a radical antipolitical edge as well. To these influences were added the European flavor of Herbert Spencer, Pierre-Joseph Proudhon, Max Stirner, and Michael Bakounin.

In editing *Liberty,* Tucker both filtered and integrated the theories of such European thinkers with the uniquely American labor, freethought, and free-love movements to produce a rigorous system of individualist anarchism subsequently identified with him[10]. It became known as "philosophical anarchism" or, in a phrase often applied derogatorily, "Boston anarchism."

In 1876, in what may be considered Tucker's debut into radical circles, Heywood published Tucker's English translation of Proudhon's classic work *What Is Property?* Shortly afterward Tucker commenced the publication of a freethought periodical entitled *Radical Review* (New Bedford, Mass., 1877–1878), which lasted only four issues. A substantial portion of the four issues, however, was devoted to a partial translation of Proudhon's *Systems of Economical Contradictions*, also translated into English by Tucker.

Although Tucker was a prolific writer, virtually the entire body of his work, other than his translations, appeared as articles in *Liberty.* Some of these articles were subsequently issued as pamphlets. Tucker's key work, *Instead of a Book, by a Man Too Busy to Write One* (1893), was a compilation of articles selected from *Liberty* with the subtitle *A Fragmentary Exposition of Philosophical Anarchism.*

The Social Context of *Liberty*

In the late nineteenth century, Tucker and *Liberty* formed the vital core around which a radical individualist movement reconstituted itself and grew. In a wider social and

8. Greene's main impact seemed to have been to serve as a conduit to Tucker for Proudhonian ideas.

9. Although *The Word* clearly began as a vehicle for labor reform, Heywood's personal commitment to promoting birth control resulted in its pages' becoming increasingly devoted to free-love issues—much to Tucker's dismay.

10. The Freethought movement demanded the complete separation of church and state. The Free Love movement demanded that all sexual arrangements be left to the consent and consciences of those adults involved, with no control by legislation.

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cultural context, however, *Liberty* was merely one among many radical periodicals published in America around the turn of the century.

The post-Civil War decades were a time of social turmoil and erratic economic growth, with many voices calling for reform. The ideologies expressed ranged from state socialism to populism, progressivism, and anarchism. A jumble of issues competed for space in newsprint: single-tax, temperance, women's suffrage, labor unions, land reform, birth control, state-funded education, and others. A wide array of movements offered different solutions to societal problems. Few of these movements were individualistic.

True to the maxim "war is the health of the state," the Civil War had nearly killed the radical individualist movement in America. The rampant growth of government caused by the war and its aftermath had created an environment increasingly hostile to individual rights. Moreover, the groups and personalities who had constituted the core of the individualist movement—such as William Lloyd Garrison and his abolitionist cadre—had been badly divided by internal conflicts largely about whether or not to support the war.

After the devastation, radical individualism tended to be expressed not as an integrated movement in its own right but as an extreme faction within other movements, particularly within labor-reform, freethought and free-love. Against this broader social and political backdrop, *Liberty* began its career. It became the focus around which a distinctive individualist movement coalesced and gained vigor.

Major Themes

Radical individualism in nineteenth-century America is commonly called individualist anarchism. As part of this continuing ideological tradition, *Liberty* neither emerged from nor operated within an intellectual vacuum. The tradition from which *Liberty* arose centered on two fundamental themes.

The first was "the sovereignty of the individual," sometimes expressed as "self-ownership"—a term popularized by Garrisonian abolitionism. Self-ownership maintains that every human being, simply by being a human being, has an inalienable moral jurisdiction over his or her own body and over what he or she produces. This universalizable right, or claim, was what Tucker meant whenever he used the Spencerian phrase "the law of equal liberty." As Tucker (1893) wrote, "Equal liberty means the largest amount of liberty compatible with equality and mutuality of respect, on the part of individuals living in society, for their respective spheres of action" (65).

The second theme of individualist anarchism was economic: in general, the movement espoused a version of the labor theory of value, often expressed by the phrase "cost the limit of price."[11] Adherents of the labor theory of value claimed that all wealth is created by labor and usually implied that, therefore, all wealth belongs unquestionably to the laborer. Individualist anarchists considered this concept to be a

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direct extension of self-ownership. As Tucker phrased it:

> It will be seen from this definition that Anarchistic property concerns only products. But anything is a product upon which human labor has been expended. It should be stated, however, that in the case of land, or of any other material the supply of which is so limited that all cannot hold it in unlimited quantities, Anarchism undertakes to protect no titles except such as are based on actual occupancy and use. (61)

Liberty Appears

Liberty first issued on August 6, 1881, from Boston with an introduction typical of Tucker, then a journalist in the editorial department of the *Boston Globe*.[12] "It may be well to state at the outset," he declared of *Liberty*, "that this journal will be edited to suit its editor, not its readers."[13] Despite this caveat, *Liberty* served as a relatively open forum for radical individualist debate, with many of the early unsigned editorials, often ascribed to Tucker, being actually written by Spooner or Henry Appleton.

Fittingly, the subtitle of *Liberty* was a quotation from Proudhon—"Liberty: not the daughter but the mother of order." The journal's primary commitment was to economic reform. It was broad enough in its interests, however, to feature a portrait of Sophie Perovskaya, a Russian nihilist martyr, in the center of its front page. As in issues thereafter, the first page was entitled "On Picket Duty" and presented a survey of contemporary periodicals, events, and personalities. The remainder of the issue dealt with labor, freethought, rights theory, and other antistatist issues.

Liberty served as a clearinghouse for contemporary individualist periodicals, with Tucker ever alert to the appearance of a relevant new journal in America or abroad, ever poised to condemn the deviations of an established one. He reprinted appropriate or egregious articles and often praised or engaged in debate with editors and contributors. Debates were especially common with British individualists such as J. Greevz Fisher, with whom *Liberty* disputed economic theories of interest and the tangled question of children's rights.[14]

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11. This key phrase was the title of the second section of *Science of Society*, Stephen Pearl Andrews' 1852 presentation of Warren's philosophy. *Liberty* serialized it, October 30, 1886, to December 31, 1887. Thereafter, it was published by Sarah E. Holmes, an intimate of Tucker's, and advertised by *Liberty*.

12. In 1892, *Liberty* moved from Boston to New York as a consequence of Tucker's becoming the editor of the New York periodical *Engineering Magazine*.

13. *Liberty* (1 [August 6, 1881]: 1). During its time of publication, *Liberty* showed the influence of several persons, not the least of whom were A. P. Kelly and Victor Yarros, each an associate editor for a period.

14. To the ears of modern individualists, the economic theories of the British individualists sound more "Austrian" and contemporary.

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Debating Egoism and Natural Rights

Liberty's first major debate was an internal one among its own regular contributors over the newly emerging ideology of Stirnerite egoism. The debate was sparked by Stirner's pivotal work on law, property, and the state: *The Ego and His Own*.[15] Sketching this debate provides a window into the tone and level of intellectual discussion *Liberty* promoted.

Stirner, whose real name was Johann Kaspar Schmidt, had published *Der Einzige* in German in 1845 to widespread but shortlived acclaim. In the late 1880s, interest in Stirner's ideas among American intellectuals was stirred by the translations and popularization provided by James L. Walker, Steven T. Byington,[16] and John Beverly Robinson. Walker published the first twelve chapters of his pioneering work *Philosophy of Egoism* in the May 1890 to September 1891 issues of the anarchistic *Egoism*.[17] Even before this series, however, *Liberty* had introduced egoism through the articles of Walker and of George Schumm, a close associate of Tucker who spent much of his life as a proofreader for the liberal weekly *The Nation*. The ensuing debate centered on whether egoism or natural rights formed the proper basis of radical individualist theory.

The March 6, 1886, issue of *Liberty* printed an article by Walker, who often wrote for Tucker under the pseudonym of Tak Kak. This article, "What Is Justice?" initiated the debate. Walker referred to such ideas as "right," "wrong," and "justice" as "merely words with vague, chimerical meanings."[18] Previously, natural law had been widely assumed to be the foundation of individualism, radical or not. Now egoism rejected the concept of "ought" as a proper factor in governing man's emotions or behavior and claimed instead that enlightened self-interest provided the only realistic basis for human conduct.

Natural-rights theorists—John F. Kelly, Gertrude Kelly, Sidney H. Morse, William J. Lloyd—claimed there was an objective right and wrong to human behavior based on the nature of man and reality. Only by having an objective standard of values could people have a benchmark against which to judge whether government laws were just.

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15. The *Ego and His Own* was published in an English translation by Steven T. Byington in 1907. Before then, much of American egoism was based on the secondary material produced by radicals who read German.

16. Some ambiguity exists about the spelling of Byington's first name. It sometimes appears in *Liberty* as "Steven," and certain secondary sources favor this spelling, but at other times *Liberty* lists him as "Stephen"; for example, Byington (1900).

17. *Egoism* (1890–97), edited by Georgia and Henry Replogle from California, was also a significant vehicle of Stirnerite philosophy. *Egoism* had considerable influence on Tucker. When Tucker agreed with J. Greevz Fisher's natural-rights position on children, its editor, Henry Replogle (under the pseudonym of "H") rushed to correct him. "'H' very properly takes me to task," Tucker commented in *Liberty* (9 [June 29, 1895]: 3). Tucker changed his position to conform with this criticism.

18. Walker (1886, 8). James L. Walker apparently formulated his theory of egoism independently, only later discovering the great similarity to Stirner's theory.

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The Stirnerite egoists were no less antigovernment than their natural-rights counterparts. They merely constructed anarchism along different lines. They rejected the state because it sought to chain the individual to the general will. This argument was not a rejection of society or its value, which Stirner called "union by advantage." Society provided true and invaluable benefits to the individual, benefits the state disrupted. But the egoists rejected more than natural rights: they abandoned the concept of "principles" itself. Tak Kak declared that "the devotee of a fixed idea is mad. He either runs amuck, or cowers as mesmerized by the idea" (Walker 1887).

In early 1887, John Kelly, who was a staunch Spencerian, accurately assessed Tak Kak as saying "that the idea of right is a foolish phantasy, or that there are no rights but *mine,*—that is to say, that there are not rights, only mights" (Kelly, 1887b, 7). The natural-rights side of the debate accused the egoists (Tak Kak, Tucker, Schumm) of destroying not only natural rights but also individualist anarchism.

The egoists argued that they were merely reducing the concept of rights to its proper place as an artificial, useful construct with which to organize society. Converted to egoism, Tucker continued to believe in what he called "society by contract," but he came to view rights as by-products of contracts between individuals, not as existing on their own. Tucker suggested that rights were

> a tacit agreement or understanding between human beings...as individuals living in daily contact and dependent upon some sort of cooperation with each other for the satisfaction of their daily wants, not to trespass upon each other's individualism, the motive of this agreement being the purely egoist desire of each for the peaceful preservation of his own individuality. (Walker 1886, 8)

John Kelly leaped to attack Tucker's version of rights as springing full grown from the act of contracting as being self-contradictory. He wrote, "What I contend is that it is impossible to base a society upon contract unless we consider a contract as having some binding effect, and that the binding effect of a particular contract can not be due to the contract itself" (Kelly 1887a, 7).

By this statement, Kelly pointed out what he believed to be the major philosophical flaw of egoism. A contract presupposes a moral system—for what does it mean to contract if not to voluntarily exchange what is mine for what is yours? Embedded in the very idea of contract is the concept of a voluntary as opposed to a forced exchange, and the concept of property, of mine versus thine. Property, the natural-rights advocates maintained, is a moral concept. To claim that rights spring from contract, they contended, is to invert the logical order. Contracts can occur only in relation to preexisting rights.

From this point of departure, the debate became more heated and complex. Eventually, the controversy polarized the contributors to *Liberty,* prompting many of the natural-rights advocates to withdraw permanently from its pages.

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Thereafter, *Liberty* decidedly leaned toward egoism, though the content changed little as a result. The first English translation of Stirner's *The Ego and His Own* was published by Tucker and given such priority that he decided not to issue the February 1907 *Liberty* in order to concentrate on that work. "Thanks to Mr. Byington, the translator," Tucker wrote, "it is superior to any translation that has appeared in any other language and even to the German original." Tucker's commitment to egoism may be judged by his statement, "I have been engaged for more than 30 years in the propaganda of Anarchism, and have achieved somethings of which I am proud; but I feel that I have done nothing for the cause that compares in value with my publication of this illuminating document" (Tucker 1907, 1).

Liberty and Literature

Although *Liberty* focused on politics and social theory, Tucker appreciated the importance of culture and its impact on societal attitudes.

For example, literature played a prominent role in *Liberty*'s emphasis on internationalism. Tucker kept current on the state of art and letters in France, England, and America. When Max Nordau published his antimodernist work *Degeneration* (*Entartung*), Tucker was discerning enough to solicit a critique from the one man best able to handle it—George Bernard Shaw. Shaw's subsequent essay, "A Degenerate's View of Nordau," was one of the first articles by the British literary giant to appear in America. Among the literary works *Liberty* translated and published were Claude Tillier's *My Uncle Benjamin,*[19] Emile Zola's *Money,*[20] Octave Mirabeau's *A Chambermaid's Diary,*[21] Felix Pyat's *The Rag Picker of Paris,*[22] and Sophie Kropotkin's *The Wife of Number 4,237*[23]—an account of her experience with her husband Pierre Kropotkin at Clairvaux prison.

This fascination with cosmopolitan literature led Tucker to publish *The Transatlantic* (1889–90), a biweekly literary magazine. The advertisement for this publication in *Liberty* promised: "Every number has a complete translated novelette, a piece of European Music, a Portrait of a Foreign Celebrity and part of a translated European Serial." *The Transatlantic* was said to consist of the "cream of the European press translated into English. Not only from foreign periodicals, but from books as well."[24] Predictably, much

19. This 312-page novel was translated from the French by Tucker and published in both cloth and paper. It was first advertised in *Liberty* (7 [November 29, 1890], 7).

20. This 435-page novel was translated from the French by Tucker and published in both cloth and paper. It was first advertised in *Liberty* (7 [April 4, 1891], 8).

21. This 460-page novel was translated from the French by Tucker and published in both cloth and paper. It was first advertised in *Liberty* (7 [December 1900], 8).

22. This 325-page novel was translated from the French by Tucker and issued in both paper and cloth. It was first advertised in *Liberty* (7 [July 12, 1890], 8).

23. This material was translated from the French by Sarah E. Holmes at Tucker's request and reprinted in five segments, beginning March 6, 1886.

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of the literature that interested Tucker had political implications. When Oscar Wilde's plea for penal reform, *The Ballad of Reading Gaol*,[25] was widely criticized, for example, Tucker enthusiastically endorsed the poem, urging all of his subscribers to read it. Tucker even published an American edition. From its early championing of Walt Whitman's *Leaves of Grass*[26] to a series of short stories by Francis du Bosque in its last issues, *Liberty* was a vehicle of controversial, avant-garde literature.

Liberty Abroad

Tucker and *Liberty* were hybrids, rooted both in the uniquely American tradition of individualist anarchism and in some distinctively foreign traditions. The cosmopolitan Tucker acknowledged no intellectual boundaries and tolerated no political ones; national boundaries were simply physical manifestations of government, an institution he adamantly rejected.

Tucker's stress on internationalism was apparent from the first page of the first issue of *Liberty*, on which, under the heading "About Progressive People," he reported news of foreigners such as Percy Shelley, whose son had died; Patrick Egan, who had just purchased the "Dublin Irishman"; and Lord Kimberley, who had been suddenly converted to the cause of land reform. Here and in subsequent issues Tucker made particular note of foreign periodicals. For example, he declared to America that "the first number of a weekly journal called 'Victor-Hugo' recently appeared in Paris" (Tucker 1881b, 1).

His embrace of international anarchism was reflected in the many articles *Liberty* reprinted from foreign journals and in the correspondents who reported on the progress of liberty in their native countries. These correspondents included David Andrade (Australia), Vilfredo Pareto (Italy), and Wordswort Donisthorpe (England), founder of the Liberty and Property Defense League.

Distinctly foreign events and concerns, such as the plights of Russian nihilists and Irish tenants, often received from *Liberty* more attention than American concerns. Tucker was outraged by the imprisonment of the Italian Amilcare Cipriani, the trial of Louise Michel, and the plight of Russian refugees in Paris. His attempt to establish individualist anarchism as an international movement was best exemplified by *Libertas*, a German-language version of *Liberty*, published by Tucker and edited by George and Emma Schumm. "This will be the only thoroughly Anarchistic German journal ever

24. *The Transatlantic*, subtitled *A Mirror of European Life and Letters*, was first advertised in *Liberty* (6 [October 5, 1889]: 8) as being issued on the 1st and 15th of the month.

25. Tucker published both a cloth and a paper edition, which were first advertised in *Liberty* (13 [May 1899], 8).

26. First advertised in *Liberty* (1 [July 22, 1882]: 4). Tucker appended a challenge to various officials responsible for the suppression of *Leaves of Grass*. He advised them of his intention to sell the work and offered to deliver a copy of it to them at their place of choice to be used in evidence against him. There were no takers.

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published in the world," Tucker wrote in announcing *Libertas*. "The paper will be of the same shape and size as the English *Liberty*, and the two will alternate in the order of publication—the English appearing one week and the German the next" (Tucker 1887, 4). *Libertas* was short lived.

The Demise of *Liberty*

Liberty came to a sudden, tragic end. In 1907, Tucker rented a ground-floor space at 502 Sixth Avenue in New York City, which housed "Benj. R. Tucker's Unique Book Shop." Some blocks away, at 225 Fourth Avenue in a structure known as the Parker Building, Tucker stored the stock of the books he published and the equipment to set print for *Liberty*. In January 1908,[27] the Parker Building was consumed by a fire that he described in what was to be the last issue of *Liberty*.

Tucker, who had been publishing and stockpiling material for thirty years, had pursued a deliberate policy of not holding insurance in order to protest the artificially high premiums propped up by the legal system. To offset the total loss, friends of *Liberty* launched a fund-raising drive, and Tucker continued to sell the stock that had survived by virtue of being at the Sixth Avenue address.

The efforts to salvage *Liberty* were not successful, however, and Tucker announced, "It is my intention to close up my business next summer, and, before January 1, 1909, go to Europe, there to publish *Liberty* (still mainly for America, of course) and such books and pamphlets as my remaining means may enable me to print" (Tucker 1908, 1–3).

These plans never materialized. The April 1908 issue of *Liberty* was the last. Tucker moved to Europe, living first in France until World War I erupted, then settling in Monaco, where he died at the age of eighty-five on June 22, 1939. Born seven years before the start of the Civil War, he died the same year that World War II began. For the last decades of his life, Tucker largely limited his writing efforts to correspondence with friends and acquaintances.

In many ways, Tucker exemplified golden-age radical individualism, which faltered in the face of growing statism and militarism. Like other individualists, Tucker watched this growth of the state and became pessimistic. From Europe he wrote, "I hate the age in which I live, but I do not hate myself for living in it."[28]

During the advance of statism, his views began to shift. It was no longer clear to

27. The date of the fire is reported as April 1908 in the usually reliable *Men Against the State*, by James J. Martin (1970), and as January 10, 1908, in Paul Eltzbacher "Benjamin R. Tucker" in *Anarchism: Exponents of Anarchist Philosophy* (1960). An account of the fire was published in the April 1908 issue of *Liberty*, in which Tucker announced ambiguously, "No later than January 10 this composing room, together with the entire stock of my publications and nearly all my plates, was absolutely wiped out by fire" (1).

28. Letter to Ewing C. Baskette, November 7, 1934. The New York Public Library maintains the Tucker Papers, with letters and documents relating to Benjamin Tucker.

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Tucker that economic freedom alone could overcome the problems created by government monopoly. His pessimism increased with time. In a letter to his old friend C. L. Swartz, a despondent Tucker expressed his belief that civilization was in its death throes.

Perhaps this despair, coupled with his love of French culture, led Tucker to support the Allies in World War I. Although he supported the communists Sacco and Vanzetti against persecution by the American state, Tucker displayed less and less interest in American affairs. Two days after his death, he was buried in Monaco with a private, civil ceremony. He was survived by his wife and daughter.

Other than writing a few articles and conducting a correspondence with the editors of various journals, Tucker was unproductive in his last years. His death, like that of Spencer, marked the end of an era. Individualist anarchism as an organized movement in America would not appear again for many years.

Liberty: Success or Failure?

Was *Liberty* or, more generally, nineteenth-century radical individualism successful? The answer depends on the standard of success being employed. By its own stated goals of changing society toward individual freedom and away from state control, radical individualism was certainly a failure. But one of Tucker's greatest achievements lies in his many translations of foreign radicals, such as Proudhon, Bakounin, Hugo, Tolstoy, and Chernyshevsky.[29] History, though, is more likely to credit the impact of these works to the authors rather than their translator.

A more generous approach to *Liberty's* legacy, however, is to assess the movement's externally imposed limitations, asking how much it achieved in spite of them.

The last decades of the nineteenth century were a golden age of radicalism in the United States. Anarchists issued nearly 500 periodicals in a dozen languages, ranging from French to Yiddish. Only a minority of these periodicals were individualistic, for the dominant radical philosophy of the day was socialism in its many forms.

In essence, the Civil War had dealt such a severe blow to the individualist movement that it never recovered. The war ushered in conscription, the suspension of habeas corpus, widespread censorship, military law, political prisoners, and legal tender legislation, as well as soaring taxes and tariffs. The status and functions of government inflated as never before.

Equally important, the prevailing view of government changed. With the Declaration of Independence and the cry of "no taxation without representation," government had been deemed to rule through the consent of the people. When the North refused to permit the South to withdraw its consent through secession and when it

29. Tucker's influence extended beyond the political sphere. Eugene O'Neill claimed that Tucker had deeply affected "his inner self," and Whitman exclaimed, "I love him: he is plucky to the bone" (Woodcock 1962, 459).

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imposed an unpopular government on the South, the consensual view of government was severely weakened. Moreover, instead of viewing the relatively autonomous states as forming a loose federal union—as composing "*these* United States"—a new description arose, "*the* United States." As this centralized nation was deemed to be "One Union under God," the mystification of the American state proceeded.

In addition, the Civil War had caused extremely divisive schisms within the individualist movement. Some of the abolitionists had welcomed the conflict as a holy war to end slavery. Others had considered it to be an unavoidable evil in pursuit of good and therefore supported the North as the least objectionable alternative. Even the staunch pacifist Garrison had supported the war. His support had horrified other abolitionists, such as Heywood and Spooner, who saw the war as a massive violation of life and property, which could not be justified by reference to any goal. By the end of the war, individualist principles had been so compromised and the state had achieved such prominence that the individualist anarchist movement could not be a significant force in American politics.

After 1865, radical individualism existed as an extreme faction within various other reform movements such as freethought, free love, and the labor movement. Although the basis of a systematic philosophy existed in the writings of theorists such as Warren and Spooner, it lacked cohesion. Not until Tucker's publication of *Liberty* did radical individualism become a distinct, independent movement functioning in its own name and seeking its own unique goals.

This consolidation was the primary accomplishment of *Liberty*. It discussed and integrated ethics, economics, and politics to build a sophisticated system of philosophy. For three decades it provided a core around which a revitalized movement could flourish. During those years Tucker issued an unremitting flood of pamphlets and books promoting individualist thought. Even in the last days of *Liberty*, translations such as that of Paul Eltzbacher's *Anarchism* appeared. Eltzbacher's classic *Anarchism: Exponents of the Anarchist Philosophy* was translated by Byington. As with many of the translations offered by *Liberty*, the imprint of the anarchist translator was keenly felt, not only in the word choices but also in Byington's many added notes and his preface.[30]

Tucker himself was acutely aware of the slow progress of social reform. He wrote, "The fact is that Anarchist society was started thousands of years ago, when the first glimmer of the idea of liberty dawned upon the human mind, and has been advancing ever since—not steadily advancing, to be sure, but fitfully, with an occasional reversal of the current."[31]

30. For example, in the chapter entitled "Benjamin R. Tucker," Byington comments on what he considers to be a misinterpretation of Tucker's words "the law of equal liberty": "TRANSLATOR'S NOTE: Eltzbacher does not seem to perceive that Tucker uses this as a ready-made phrase, coined by Herbert Spencer and designating Spencer's well-known formula that in justice 'every man has freedom to do all that he wills, provided he infringes not on the equal freedom of any other man'" (Eltzbacher 1960, chap. 8, n. 11).

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Yet radical individualism hindered itself. The historian David De Leon in *The American as Anarchist* (1978) observed: "Nineteenth century anarchism failed primarily because it seemed archaic in the twentieth century" (82). Perhaps most destructively, individualism clung to the labor theory of value and refused to incorporate the economic theories arising within other branches of individualist thought, theories such as marginal utility. Unable to embrace statism, the stagnant movement failed to adequately comprehend the logical alternative to the state—a free market.

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31. *Liberty* (December 1900). Ultimately, Tucker himself seemed to lose faith in the inevitability of liberty. In an interview with Paul Avrich, his daughter Oriole reported, "I was never really an anarchist. I don't think it would ever work. Neither did Father at the end. He was very pessimistic about the world and in his political outlook" (Avrich 1988, 152).

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REVIEW ESSAY

Democracy and War

TED GALEN CARPENTER

R. J. Rummel, professor of political science at the University of Hawaii, has justifiably acquired a reputation as an outstanding scholar of violence perpetrated by the political state. His book *Death by Government* (New Brunswick, N.J.: Transaction Publishers, 1994) is a detailed, searing, and compelling indictment of the mass murder (more than 169 million victims) committed by governments during the twentieth century.

Rummel has also long been a proponent of the "peaceful democracies" thesis: that democracies are markedly less prone than are authoritarian or totalitarian states to resort to violence in the conduct of their external relations and that democracies never (or almost never) fight other democracies. In *Power Kills: Democracy as a Method of Nonviolence* (New Brunswick, N.J.: Transaction Publishers, 1997), he provides the most systematic development of that thesis to date. Unfortunately, his reach greatly exceeds his grasp.

The realist faction of foreign policy scholars—especially the so-called structural realists, who argue that conflict is inherent in an international system that has no central authority and is made up of nation-states with conflicting interests—is Rummel's principal target. The realists are wrong across the board, he contends.

> Wrong with regard to war and lesser international violence. Wrong about civil collective violence. Wrong about genocide and mass murder. There is one solution to each and the solution to each case is the same. It is to foster democratic freedom and to democratize coercive power and force. That is, mass killing and mass murder carried out by government is a result of indiscriminate, irresponsible Power at the Center. (p. 3)

Ted Galen Carpenter is Vice President, Defense and Foreign Policy Studies, at the Cato Institute.

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In addition to that general conclusion, Rummel asserts that several key propositions about democracy and violence have been "uncovered or verified." Among the more important are the following: "Well established democracies do not make war on and rarely commit lesser violence against each other" (p. 4). "The more two nations are democratic, the less likely war or lesser violence between them" (p. 5). "The more a nation is democratic, the less severe its overall foreign violence" (p. 5). Indeed, Rummel contends that for "theoretical reasons" he "would expect no violence between democracies at all" (p. 101).

He advances (with varying degrees of conviction) three explanations for the peaceful nature of democracies. The first-level explanation is that the publics in democratic societies generally prefer to avoid war. Rummel argues that although that factor (emphasized by other scholars) has some validity, it must be viewed with caution. He acknowledges that "democratic peoples have become jingoistic on occasions and enthusiastically favored war.... They can also be aggressive today, pacific tomorrow" (p. 132).

Rummel attaches greater importance to the second-level explanation: the influence of democratic institutions and culture. "Where by virtue of their institutions democratic people must, to maintain democracy, negotiate and compromise rather than fight, this becomes part of the cultural heritage" (p. 138).

Moreover, he states,

> since we deal with others through a cultural matrix, it is also natural for democratic people to perceive other regimes in these terms, to believe that all basic issues between nations can be settled by people sitting down at a table and talking them out, and to tolerate the existence of other regimes and ideologies that do not openly threaten one's democratic way of life. (p. 38)

The converse is equally true: totalitarian regimes see other regimes as being as ruthless, duplicitous, and brutal as themselves, and they act accordingly, thereby intensifying the cycle of violence.

Even more significant than the impact of democratic political culture, Rummel contends, is the third-level explanation: the operation of a "social field" based on diversity and individual freedom. "This spontaneous social field of constantly interacting individuals and groups, all pursuing their own interests, is a field of continuous *nonviolent* conflict" (p. 165; emphasis in original). In other words, the way to minimize violence, both domestic and international, is to decentralize power by strengthening civil society and constraining the role of the state.

It is a truism of science (even social science) that extraordinary claims require extraordinary evidence. Because Rummel affirms not only that democracies are on balance more peaceful than authoritarian and totalitarian systems but that a global system consisting entirely of democracies would produce a world without war, he faces

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a daunting burden of proof. In *Power Kills,* he fails to provide the necessary evidence.

Rummel does a credible job of making the case that there is a continuum of violence: as one moves from democratic states to authoritarian and then totalitarian ones, the level of violence, both domestic and international, increases. Even on that point, however, both his methodology and his arguments are sometimes dubious. For example, he attaches great weight to the fact that historically the less democratic a regime, the higher the number of battle deaths. Such data are designed to show both that democratic governments are less inclined to put their people through the meat grinder of war and that democratic populations and institutions are less tolerant of battlefield casualties.

Both propositions may well be true, but battle-death figures hardly provide compelling evidence. There are several possible alternative explanations for the markedly lower battlefield fatalities among democratic states. Most obvious, democracies have been on the winning side in most wars during the twentieth century—an important consideration because the losing side typically suffers disproportionately. The meager number of U.S. fatalities in the Persian Gulf War, for example, would appear to have had more to do with the superiority of American military technology and the abysmally stupid strategy of Saddam Hussein (a static defense in open desert terrain) than with the virtues of American democracy. Similarly, military superiority was the most probable reason that U.S. forces inflicted far more casualties than they incurred in the Korean and Vietnam conflicts.

Equally questionable are Rummel's assertions that wars between democracies (if such events occurred at all) would be less violent than those between authoritarian states and that wars between totalitarian states are, and will inevitably be, the most violent. Again, other factors can influence, and perhaps even determine, the magnitude of warfare. If the Cold War between the United States and the Soviet Union had ever turned hot, the struggle involving such a mixed dyad (one democratic state and one totalitarian state) would have been enormously destructive. Indeed, it would have been far worse than the war between China and Vietnam in 1979, even though both belligerents were totalitarian. The reason is self-evident: the United States and the Soviet Union had huge, capable military forces (including thousands of nuclear weapons). By comparison, Chinese and Vietnamese military forces were relatively puny in their destructive capacities.

Such examples illustrate a more general failing in *Power Kills.* Rummel repeatedly seems oblivious to or casually dismissive of alternative explanations of the phenomena he examines. Nowhere is that tendency more evident than in his core thesis—that democracies do not wage war against other democracies.

In making that case, Rummel relies heavily on the work of other "democratic-peace" scholars, such as Bruce Russett and Michael Doyle, as well as on his own research. Unfortunately, their scholarship usually mirrors the weaknesses in Rummel's. Quoting liberally from such studies to "refute" the arguments of realists, therefore,

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produces a less-than-compelling case.

For example, Rummel favorably cites Doyle's observation about Italy's abrupt decision to switch alliances as World War I began.

> Italy, the liberal member of the Triple Alliance with Germany and Austria, chose not to fulfill its obligations under that treaty to support its allies. Instead, Italy joined in an alliance with Britain and France, which prevented it from having to fight other liberal states and then declared war on Germany and Austria. (p. 177)

Rummel proceeds to emphasize the point that "Italy changed from the side it was obligated to fight on to line up with the democracies" (p. 177)

At the least, both scholars have engaged in egregious oversimplification. Many reasons prompted Italy's decision, but few historians would maintain that a sense of democratic solidarity was the dominant motive. Italian leaders had far more mundane considerations—most notably the desire to detach large portions of Austro-Hungarian territory in the southern Tirol and the northwestern Balkans. It is revealing that London and Paris, Rome's new democratic allies, did not merely appeal to the Italian leaders' sense of democratic solidarity; they explicitly assured the Italians that their territorial claims would be recognized in the event of an Allied victory.

That same tendency to minimize or ignore factors other than the existence of democracy as an explanation for the apparent lack of wars among democratic states appears throughout the book. Rummel is almost contemptuous of the important article in which the RAND Corporation's Christopher Layne examined a number of military "near collisions" between democratic states ("Kant or Can't: The Myth of the Democratic Peace," *International Security* 19 [Summer 1994]: 5-49). Those included the U.S.-British confrontation over the *Trent* affair in 1861, the Anglo-American crisis over the Venezuela boundary dispute in the mid-1890s, and the British-French war scare over control of the Nile River (the so-called Fashoda incident) in 1898. Layne's overriding point is that in every case, the bulk of the evidence indicates that the parties pulled back from the brink of war not because of domestic pressures against fighting another democracy but because of realist strategic calculations. For example, French leaders concluded that they could not win a war against Britain, and British leaders in the 1890s concluded that Wilhelmine Germany posed a more serious long-term threat to British interests than did American preeminence in the Western Hemisphere.

Rummel dismisses Layne's treatment as subjective conjecture, emphasizing that the only pertinent fact is that in all those cases the countries involved in the crises ***"did not fight"*** (p. 42, emphasis in original). But the probable reasons for a phenomenon are at least as important as its existence. And no robotic invocation of statistical data on the alleged lack of armed combat between democracies ought to spare a scholar from the need to engage in such analysis. (After all, one can establish a strong statistical correlation between the crowing of roosters and sunrise. It would, however, be

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manifestly absurd to assume that the former caused the latter.)

The need to consider probable reasons for a phenomenon becomes even more apparent with another of Layne's examples, the French military occupation of Germany's Ruhr region in the early 1920s. A case in which one democratic country forcibly seized the most economically valuable portion of its democratic neighbor's territory should have elicited an extended discussion from Rummel. The mere fact that Weimar Germany did not militarily resist the occupation is hardly the salient point. The contemporary and historical records are quite clear that German leaders recognized their country's military impotence and realized they could not prevail. To contend that the lack of a war in that situation supports the proposition that democracies do not fight other democracies borders on perversity.

Unfortunately, Rummel's failure to adequately discuss the Ruhr incident is not an aberration. Throughout the book he avoids the "hard cases" that might cast doubt on the peaceful democracies thesis. One example is the Boer War of the late 1890s, a British bid to conquer the Orange Free State and the Transvaal. That conflict produced shocking acts of brutality on both sides. Because Britain was indisputably democratic (Rummel concedes that point) and the Boer states were, in his lexicon, "oligarchic republics" (politically democratic within a restricted electorate—in this case, whites only) and were perceived as democratic by the British, the war ought to be a troubling episode for Rummel and like-minded scholars. Yet he barely mentions it.

Rummel's treatment of America's War between the States is little better. In cursory discussion he states that no major power recognized the Confederacy as an independent state and he asserts that it was not a real democracy in any case because only white males could vote and President Jefferson Davis was not directly elected. The inconvenient matter that Southerners considered their new confederacy democratic (which it was by the standards of the day) and that most Northerners did not dispute that view (they merely regarded it as beside the point) is simply ignored. The willingness of democratic Americans to wage an enthusiastic internecine slaughter fairly cries out for a more serious discussion. If a democratic people could do that to their own, how confident can we be that two democracies divided by culture or race (e.g., the United States and Japan) would recoil from doing so? At the very least, proponents of the democratic-peace thesis cannot assume that the point is self-evident.

A third hard case virtually ignored by Rummel is the western front in World War I—the bloody struggle between Britain and France on one side and Wilhelmine Germany on the other. Layne and other scholars have made solid arguments that Germany was a democratic state, as it had an elected parliament with significant powers, vigorously contested elections involving multiple parties, broad suffrage, and a reasonably free press. Although it also had some autocratic features, so did Britain and France.

World War I tends to give democratic-peace theorists intellectual indigestion, and for good reason. If Wilhelmine Germany is acknowledged to have been democratic, World War I alone is probably enough to falsify the democratic-peace thesis, given the

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extent of the bloodletting on the western front. (To argue otherwise would risk creating the social science equivalent of the old joke "Other than that, Mrs. Lincoln, how was your evening?") Of course, Rummel may have had irrefutable evidence that Wilhelmine Germany was not democratic, but if so his readers were entitled to see it.

To have engaged that issue, however, would have required him to be far more explicit about the features of a democracy and why certain countries during the nineteenth and twentieth centuries were or were not democratic. Instead, we get a vague and slippery treatment of that topic. Frequently, it is not clear whether Rummel is applying his own definition or that of one of his democratic-peace colleagues. Nor is it always clear whether certain political features are indispensable or to what extent the definition of a democracy depends on the norms of the era being discussed. That unsystematic approach produces erratic and arbitrary designations. For example, Rummel asserts that Britain did not become a liberal democracy until 1884 (p. 109). Why was that year so important? Because the franchise was then extended to agricultural workers. But why did that measure make Britain a democracy even though women (half the adult population) were not granted the vote until several decades later?

Rummel is so determined to prove his thesis about peaceful democratic solidarity that he virtually ignores conflicting evidence. Sometimes that tendency produces embarrassing overstatements clearly at odds with the facts. He asserts at one point that "with the spread of democracy around the world, armies and secret services would be less and less needed. *Indeed, with near universal democratization, they could be eliminated altogether*" (p. 17; emphasis in original). But both present and former U.S. intelligence officials acknowledge that democracies routinely spied on one another, even during the Cold War, when they confronted a dangerous mutual security threat. (The Jonathan Pollard case, in which Israel conducted espionage against the United States, is merely one celebrated example.) Indeed, democratic intelligence services sometimes did more than spy. Another episode barely mentioned by Rummel was the successful CIA effort to overthrow the elected governments of Iran (1953) and Guatemala (1954). Those incidents cast further doubt on the democratic-peace thesis; if officials in the United States were willing to mount covert operations to overthrow two sister democracies—and bring highly authoritarian regimes to power in both instances—why should we assume that they would have recoiled from using military force?

Moreover, intramural democratic espionage has not abated with the end of the Cold War. As the *Wall Street Journal*'s John Fialka, Cato Institute research fellow Stanley Kober, and others have shown, espionage (particularly economic espionage) has actually increased since the end of the Cold War—precisely the opposite of what Rummel would have predicted. Within weeks of the publication of *Power Kills,* U.S. Navy intelligence analyst Robert Kim was convicted of passing classified information to South Korea, not only another democracy but a U.S. military ally.

In the broadest sense, the argument that the world would be better off if all countries had strong civil societies and were governed by decentralized, democratic

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regimes is correct. It would almost certainly be a more peaceful world. But that is not the same as claiming that universal democracy is a panacea that will banish war. That democracies have *never* waged war against other democracies remains highly debatable despite the categorical assertions presented in this book. Likewise, Rummel's analysis does not establish that the absence of armed conflict between democracies since World War II (a rather brief period in any event) is due to the factors he identifies rather than other influences—for example, the existence of a powerful totalitarian threat that inhibited intrademocratic squabbles. Rummel makes an array of extraordinary claims, but he ultimately fails to prove his case.

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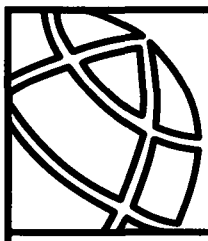

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BOOK REVIEWS

✦ The Politics of Faith and the Politics of Scepticism

By Michael Oakeshott. Edited by Timothy Fuller

New Haven and London: Yale University Press, 1996.
Pp. xx, 139. $25.00 cloth.

Without doubt one of the twentieth-century's most important political philosophers as well as a masterful stylist of the English language, Michael Oakeshott remains—despite a recent upsurge in interest—a lamentably neglected, ignored or, all too often, undiscovered thinker. This situation owes much to his peculiar position in the context of twentieth-century political philosophy: A Hobbesian liberal on matters of the state and a Hegelian idealist for whom the moral life is grounded in the activities of historically situated individuals, he was an original intellect drawn neither to the analyses of English-speaking philosophers nor to the discussions of European thinkers. After some twenty years as a fellow and lecturer in history at Cambridge, he was awarded the chair of political science at the London School of Economics in 1951. Yet in an age of specialization Oakeshott did not write the academic paper but the well-wrought essay or book—deeply informed and reflective of wide learning, graced by felicitous metaphor, and cast in a philosophical mode that is, on occasion, abstract and elusive but always intelligent and suggestive.

Although his most noted work in political philosophy continues to be the collection *Rationalism in Politics and Other Essays*, recently reedited by Timothy Fuller (Indianapolis: Liberty Press, 1991), his writings include *On Human Conduct* (Oxford: Clarendon, 1975); his Harvard lectures of 1958, *Morality and Politics in Modern Europe,* edited by Shirley Robin Letwin (New Haven, Conn.: Yale University Press, 1993); and two additional collections by Fuller: *Religion, Politics and the Moral Life* (New Haven Conn.: Yale University Press, 1993) and the superb essays on liberal education, *The Voice of Liberal Learning: Michael Oakeshott on Education* (New Haven, Conn.: Yale University Press, 1989).

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Some five months after his death (in December 1990) the current work, hitherto unknown to the editor or other close associates, was found in his cottage in Dorset. This book, undated and divided into six chapters, is accompanied here by an introduction in which Fuller relates the book to salient themes of some of the writings just noted. Having contended in some of these works that we should be wary of political rationalism and that politics, properly understood, is nothing more than the "pursuit of intimations" yielded by traditions or practices of behavior, Oakeshott focuses in these pages on the related theme of how modern European governments since the fifteenth century have been subject to two divergent modes or *styles* of politics: faith and scepticism. These styles, employing the same vocabulary and rarely found pure and unmixed, are tendencies rather than theories or doctrines, in a sense akin to what Thomas Sowell calls "constrained" and "unconstrained" visions (*A Conflict of Visions: Ideological Origins of Political Struggles.* New York: William Morrow, 1987).

The style of faith seeks the perfection of mankind in this world and assumes that government is the means for achieving a comprehensive revision of the human condition. Whether it is utopian or seeks only steady improvement in a single direction, the style of faith assumes that human power alone can achieve the end state; thus it not only seeks but welcomes power, allotting to government an omnicompetence that moves far beyond the amelioration of conflict or the maintenance of a legal framework for peaceful interaction. Indeed, the government of faith becomes the very means for arriving at truth, and it demands of its citizens not just obedience or submission but enthusiasm, affection, and love.

Not to be identified with either anarchy or the "night watchman state," the style of scepticism, grounded in a prudent doubt about our capacity to achieve perfection, assigns to government a specific and limited function: establishing and maintaining a system of rights and duties that, by preventing conflict, allows individuals to fulfill their aims and desires. In holding to these Hobbesian assumptions, the sceptic is as consistent as a public choice theorist; for although a governing institution is required, it "is occupied by men of the same make as the subjects they rule—men, that is to say, who are always liable, when they become governors, to go beyond their terms of reference and impose upon the community an 'order' particularly favourable to their own interests" (p. 33). Because a sceptical government has little to do with the imposition of morality, it also follows that "to lead a moral crusade against a foreign country is as much out of character in this style of governing as to lead a moral crusade against any of its subjects" (p. 36).

Having elucidated the divergent principles and assumptions of faith and scepticism, Oakeshott limns a historical thesis: an ideology of faith did not engender the growth of government so much as, in the transition to modernity, the circumstantial emergence of a centralized government—blessed with (among other things) new techniques of information—gave rise to a politics of faith. Because medieval societies lacked the very governmental power that might encourage an enthusiast, it was not

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until the "tireless, inquisitive, roving hand of government was beginning to be able to reach everywhere" (p. 49) that thinkers harnessed their perfectionist yearnings to the power of the government. Francis Bacon is noted as a "chief architect" (p. 52) of a perfectionism that, unlike the religious variant employed by some Protestants, encouraged the natural and economic mastery of the world through the agency of government. More recently, the politics of faith has acquired more "splendid" examples—aided in this century by wars that have "given us an unrivaled opportunity to carry out expensive experiments in this style of politics" (p. 64), but these experiments remain essentially Baconian.

Scepticism, on the other hand, though responding to the growth of modern power, is not a mere reaction to the style of faith; its roots can be found in the medieval view of government, especially the English conception of Parliament as a court of law. One of its early representatives is Montaigne, but Lord Halifax, David Hume, and Edmund Burke (among others) offer the modern variant: distrust of large concentrations of power and mindfulness of the significance of the rule of law and the independence provided by property. (John Locke, however, violates the sceptical style by allying it with a doctrine of natural rights; and those forms of republicanism that seek political salvation in universal suffrage and democracy also stray from the sceptical style.)

In the penultimate chapter, Oakeshott deals with what he refers to as the respective nemeses of faith and scepticism. Nemesis was a goddess of retribution, but the nemeses of these two styles serve not only as defeats but as *self*-defeats: for these nemeses are characteristic (essentially or contingently) of each style as it operates in its pure form, deprived of the countervailing pull of its counterpart. The nemesis of faith, essential to it, is its totalistic nature—as government pursues perfection it absorbs every activity until each is an activity of government, thus leaving nothing to be governed! "What exists (for example) is not 'football,' but 'football-in-so-far-as-it-promotes-perfection'" (p. 93). Besides this essential defeat, there are contingent ones: that a government of faith is inappropriate for a complex modern society; that its perfections are not permanent but transitory; that its demand for love and devotion cannot be obtained; that its promise of a comprehensive economic security must involve a loss of security against governmental power; and that the pursuit of perfection comes to be identified with power itself.

Neither so obvious nor so calamitous as the nemesis of faith, that of scepticism is only a contingent probability. Without the pull of faith, a purely sceptical government may not be appropriately aware of change in a complex society "and consequently is apt to be insensitive even to those effects of change which come within its province, namely the appearance of conditions which require an adjustment in the system of rights and duties if a relevant order is to be maintained" (p. 107). Moreover, the formal moderation characteristic of a sceptical manner of governing may be viewed, at least in a culture imbued with the ideals of faith, as bereft of real authority and thereby

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inappropriate for the age. The final nemesis of scepticism is that politics becomes *play,* an "activity pursued on certain specified occasions, at fixed times and in a place set apart and according to exact rules, the significance of the activity lying not in a terminal result aimed at, but in the disposition which is enjoyed and fostered in the cause of the activity" (p. 110). And the self-defeat of a style identified with play is that it may become indifferent to winning, an indifference that can be remedied only by an infusion of faith!

What, then, should be done? Having elucidated the two styles of politics as well as their implications, Oakeshott concludes that the politician should pursue not the middle course but the mean—that which is appropriate. The determination of the mean, which for Aristotle requires perception, experience, and judgment, is not found by hewing blindly to one extreme; rather, given the complexity of modern societies, we should recognize historical limitations (and possibilities) and, in so doing, follow the seventeenth-century counsel of Sir George Savile, Lord Halifax (*The Character of a Trimmer*) who urges us to be "trimmers" who seek to keep the ship of state on an even keel. Nonetheless, in the current situation, in which the style of faith overwhelms all political activity, the trimmer should strive to restore the recognition and understanding of complexity, renew the sceptical impulse, and otherwise sail against the winds of the age: the trimmer must be a sceptic "against the partizans of power" (p. 128).

Surely this is wise advice. In his understanding of the contemporary trimmer, as in his account of the style of scepticism, Oakeshott indicates a preference for a liberalism worthy of conservation, a liberalism more classical than contemporary, grounded not in doctrine but in the historical complexities of a mode of conduct. A contingent grounding of this kind may not suffice for those who hold that some things are True and Certain and that only such things provide motivating value. However, Oakeshott is not providing policy prescriptions or theoretical principles but "a frame within which to set our thoughts to work" (p. 125). Once within that frame, one may still find truth (even if one is less than convinced by Oakeshott's account of the nemeses or even if one questions whether political perfectionism must be understood in terms of a *single* comprehensive end). If some wish to contend, however, that Oakeshott's frame does not easily hold or contain any robust political or moral judgment, then it must be underscored that the point of a frame is to suit a picture and provide stable limits. In this respect, Oakeshott's work succeeds not only in upholding strikingly lucid, correct, and prescient portraits of two styles of politics but in securing them in a uniquely resonant style.

EUGENE HEATH
State University of New York, New Paltz

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✦ Globalizing Capital: A History of the International Monetary System

By Barry Eichengreen

Princeton: Princeton University Press, 1996.
Pp. viii, 223. $24.95 cloth.

A major theme of Barry Eichengreen's accessible history of the international monetary system since 1850 is that pegged exchange rates are viable when governments are insulated from domestic politics. Under domestic political pressure governments will give up exchange rate stability—external stability of the currency—for other goals, such as low interest rates and high employment.

The study traces the changing face of international monetary regimes:

- fixed-exchange-rate commodity-based systems—bimetallic before 1870, the gold standard thereafter—until World War I;
- the postwar reconstruction of a fixed-exchange-rate gold exchange standard, and its disintegration in the 1930s, followed by managed floating exchange rates before World War II;
- the Bretton Woods system of pegged but adjustable exchange rates from 1946 to 1971;
- and the variety of exchange-rate arrangements since: managed floating by large industrialized countries, an effort to establish monetary union in Western Europe, currency boards and nominal exchange-rate anchors in less developed countries (LDCs).

Eichengreen notes the association of exchange-rate behavior in each monetary regime with contemporaneous developments in world capital markets. Features of the gold standard era were the high level of international capital mobility and the freedom from controls of international financial transactions. The introduction of capital controls and a drastic decline in capital flows after 1928 marked the interwar period. The Bretton Woods era began with officially sanctioned capital controls. When the era ended, the controls had been eroded by the emergence of liquid international financial markets. Since the 1970s, there has been further growth of highly mobile capital flows and a deepening of international capital markets.

Eichengreen rejects the proposition that the demise of the pegged-exchange-rate Bretton Woods system and the subsequent shift to fluctuating exchange rates are wholly attributable to the resurgence of capital mobility. Fixed exchange rates and unfettered capital mobility, after all, characterized the gold-standard regime.

The explanation for the success of the pre–World War I gold standard, according to Eichengreen, was limited suffrage and the weakness of labor unions and of labor-oriented political parties. Authorities therefore could face down a challenge from the

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masses, when defense of the convertibility of domestic currencies (into the weight of gold specified by the fixed exchange rate) required raising interest rates and contracting economic activity. Under the pre-1914 gold standard, governments of the industrialized countries were committed to preserving external stability even at the cost of internal stability.

Since World War I, however, universal suffrage and the rise of a politically robust labor movement have constrained the ability of government authorities to elevate external over internal stability. The imposition of controls on capital mobility afforded them some leeway to pursue internal objectives without sacrificing the external objective. Unimpeded inflows of capital can lead to inflation and outflows to recession. Capital controls freed the authorities from these unwanted consequences, but because controls are never watertight, and eventually became unenforceable, they were no answer to the weakened commitment in modern societies to pegged exchange rates.

Eichengreen's position that the welfare state is inimical to pegged exchange rates seems to me correct as a judgment on post–World War II experience. His is a political economy view, but I believe the argument also holds true on economic grounds. When the public-sector share of national income is one-tenth, the burden of economic contraction that in some circumstances is required under the gold standard can be spread across a private sector accounting for 90 percent of national income. However, when the public sector share is one-half of national income, the burden of adhering to the gold standard becomes prohibitive for the relatively compressed private sector—hence the incompatibility of the welfare state and the gold standard.

Other themes of the work are less compelling. Throughout, Eichengreen stresses the crucial role of international cooperation in preserving monetary regimes. He contends that survival of the pre–World War I gold standard depended on cooperation in times of crisis (p. 35)—such cooperation occurred rarely enough, in my view, to make the statement doubtful. Similar comments in the book are that if other countries during the interwar period had supported the exchange rate of the nation in distress, economic conditions would not have deteriorated so badly (p. 77); that international support for its key currencies allowed Bretton Woods to stagger on (p. 123); and that in the 1980s "The limits to international cooperation in Europe of sovereign monetary authorities became clear to see" (p. 139).

Declaiming the benign consequences of international cooperation is sentimentality. Nations have interests. Eichengreen recognizes that at the domestic level, no policy consensus may exist. How much more so, it follows, will lack of consensus exist at the international level. A monetary regime that requires international cooperation for it to be viable will not survive. The design of a regime must ensure that economic relations among nations promote their self-interests.

Eichengreen believes that during the Great Depression deflation could not be avoided, because had central banks attempted to inject liquidity into financial markets to bail out banks in distress they might have violated the statutes requiring

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them to hold a minimum ratio of gold to their liabilities (p. 75). Expansionary monetary policy in his view would have raised doubts about the banks' commitment to the gold standard and provoked runs on their gold reserves by foreign holders of their currencies.

This view finds no support in the case of the Federal Reserve system. Would a hypothetical expansionary monetary policy in 1930 to 1931 have driven the United States off gold? The answer is no, according to the historical record. The United States suffered gold losses in several months following Britain's September 1931 departure from the gold standard and again from April to August 1932, when the Federal Reserve grudgingly conducted an open-market purchase. Even after these gold losses, however, the gold-reserve ratio (against Federal Reserve notes and deposits) was still at least 50 percent above the legally required minimum. In addition, by the spring of 1932 foreign claims against U.S. gold were no longer a threat, as they were almost entirely withdrawn. Just as gold losses in 1931 to 1932 did not force the United States to devalue, had they occurred in 1930 to 1931 in response to a hypothetical monetary expansion, they also would not have done so.

In August 1929, at the start of the Great Depression, the U.S. gold stock was enormous. By January 1933, thanks to gold inflows after August 1932, the stock exceeded its initial level. Thereafter, demand for gold coin and certificates soared, reflecting domestic fear of devaluation and speculative purchases of sterling, as the incoming Roosevelt administration raised doubts about its commitment to the existing gold parity.

Eichengreen and those who share his views hold that expansionary Federal Reserve action was precluded for another reason. In addition to the 40 percent gold backing, Federal Reserve notes required backing by 60 percent collateral of eligible bills—mainly bills discounted at the Federal Reserve banks by commercial banks—or of gold. Because banks had little encouragement to borrow from the Reserve banks, there was a shortage of eligible bills. Gold over and above the required gold backing for the currency was substituted for the bills, therefore reducing the system's "free gold," the amount not needed to meet either minimum reserve requirements or collateral requirements.

The problem, even if this were a true constraint on monetary expansion (which there is reason to doubt), was eliminated by the Glass-Steagall Act of 27 February 1932, which permitted government bonds in Federal Reserve portfolios to serve as collateral against the note issue. In any event, if the condition existed, it did so only during the five months from October 1931 through February 1932. Contrary to Eichengreen's analysis, it was not constraints but misguided policy that explains the failure of the Federal Reserve to engage in open-market purchases in the preceding two years to avert deflation. Not only the U.S. economy but also the economies of the rest of the world would have been spared the ravages of the Great Depression had the Federal Reserve pursued appropriate policies.

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Despite my reservations about some of the positions Eichengreen takes on historical and current monetary regimes, he has performed a useful service by providing a succinct characterization of the varieties of international monetary regimes that countries have adopted in recent decades in response to the rise of capital mobility. Forces undermining capital controls overwhelmed efforts of governments to manage their currencies. The book traces the evolution of preferences for different kinds of exchange-rate arrangements by countries against the background of swings in the behavior of their exchange rates.

For the United States and Japan the shift toward flexible exchange rates since 1971 appears sustainable, and it will likely lead smaller countries in the Western Hemisphere and Asia to tie their currencies to that of their larger neighbor. In Western Europe, after the failure of the European Snake of the 1970s and the disappointments of the European Monetary System of the 1980s and early 1990s, the countries of the European Union are engaged in an effort to form a monetary union centered on Germany, with what success the next few years will reveal.

LDCs have tried to reduce high inflation rates by unilaterally pegging the nominal exchange rate as a nominal anchor in a stabilization program. Another approach has been a collective peg, of which the Communauté Financiére Africaine (CFA), pegged to the French franc, is an example. Some small open economies have tried a currency-board arrangement as an alternative.

As Eichengreen concludes, to understand the present diversified international monetary system, one needs to appreciate its history.

ANNA J. SCHWARTZ
National Bureau of Economic Research

✦ The Great Chief Justice: John Marshall and the Rule of Law

By Charles F. Hobson

Lawrence: University Press of Kansas, 1996.
Pp. xv, 256. $35.00

✦ John Marshall: Definer of a Nation

By Jean Edward Smith

New York: Henry Holt and Company, 1996.
Pp. xi, 736. $35.00

Scholars have long agreed that John Marshall occupies a preeminent place in the growth of American constitutionalism. Marshall contributed significantly to constitutional law and cemented the institutional role of the Supreme Court as a coequal

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branch of government. Yet, despite numerous studies (see, for instance, Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801–1835*. Columbia, S.C.: University of South Carolina Press, 1997, and G. Edward White, *The Marshall Court and Cultural Change, 1815–35*. New York: Macmillan, 1988), Marshall has remained a surprisingly elusive subject for historians. The classic study by Albert J. Beveridge (*The Life of John Marshall*, 4 vols. Boston: Houghton Mifflin, 1916–19) is marred by both inaccuracies and undue partisanship. To complicate matters, Marshall's constitutional philosophy has too often been viewed in a simplistic manner designed to validate twentieth-century notions of judicial review and enlarged governmental authority.

Against this backdrop, the volumes under review represent welcome and thoughtful additions to the Marshall literature. The works complement each other. Hobson has written an acute analysis of Marshall's jurisprudence and craft of judging. Smith has provided a well-balanced biography of Marshall, looking at the many facets of his long career. Both are sensitive to the interplay between legal developments and the political currents of the age.

Relying primarily on Marshall's judicial opinions, Charles F. Hobson in *The Great Chief Justice: John Marshall and the Rule of Law* proceeds to dispel a number of stubborn myths that cloud our understanding of Marshall's tenure as chief justice. He emphasizes that Marshall's genius lay not in innovative theorizing but in effectively articulating legal principles emanating from the formation of the American Republic. Marshall has long been linked with the assertion of judicial review in *Marbury v. Madison* (1803). As Hobson points out, however, by that time "the idea that courts could void laws contravening the Constitution was no longer seriously controverted" (p. 55). Not only was Marshall simply affirming a widely shared belief, but *Marbury* can best be seen as "a strategic retreat by the judiciary" (p. 49) to avoid a political confrontation with the executive branch. Indeed, Hobson maintains that Marshall's concept of judicial review was both narrow and defensive in nature, designed to safeguard the independence of the courts and to protect the frail national union from aggressive moves by the states. Marshall never made "any claim to judicial supremacy in expounding the Constitution or to exclusive guardianship of the fundamental law" (p. 67); nor did he envision broad judicial supervision of society.

Similarly, Hobson contends that Marshall's constitutional nationalism, as expressed in decisions such as *McCulloch v. Maryland* (1819), was not intended to enlarge the powers of the federal government. Rather, Marshall sought to restrict state encroachments on the exercise of legitimate congressional authority. According to Hobson, Marshall's language "did not signify approval of the idea of an evolving Constitution" (p. 119). In *McCulloch*, Hobson continues, Marshall "did not intend to suggest that Congress, in addition to its delegated powers, could tap a vast reservoir" of implied powers (p. 123). He was concerned only with the means employed to carry out the enumerated powers of Congress. It is worth noting, moreover, that the ruling in *McCulloch* upholding the validity of the national bank was hardly a surprise.

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The constitutionality of a national bank had been extensively debated since the administration of George Washington and was not seen by most commentators as open to serious question.

Hobson also takes aim at the prevalent misreading of *Gibbons v. Ogden* (1824). Although *Gibbons* is often cited as authority for plenary congressional power over commerce, Hobson stresses the limited scope of the decision. In fact, Marshall held only that the New York steamboat monopoly violated a federal licensing statute. Marshall defined commerce in broad terms, but he expressly recognized that state police power might affect interstate commerce and left "an ample field for state legislative activity in the area of commerce and the economy" (p. 145). The decision in *Gibbons,* Hobson explains, "was less about defining the extent of federal power than about setting limits on state sovereignty" (p. 145). The vast expansion of affirmative federal authority under the commerce clause that emerged from the New Deal cannot fairly be traced to Marshall.

Far from championing unbridled judicial activism, Marshall was always mindful of the restraints on judicial power. Hobson points out that Marshall sought to distinguish legal questions from political issues. For example, Marshall repeatedly deferred to the political branches of government in matters pertaining to foreign affairs. Likewise he was cautious in handling politically sensitive slavery cases. Notwithstanding his growing personal distaste for slavery, Marshall was reluctant to second-guess legislative determinations that slavery was lawful. In short, moderation was a key component of Marshall's judicial philosophy.

Hobson correctly notes that concentration on a handful of landmark constitutional cases tends to produce a skewed picture of Marshall's jurisprudence. He reminds us that during Marshall's tenure, the Supreme Court was foremost "an appellate tribunal for adjudicating disputes between private individuals" (p. 151). The bulk of this litigation involved admiralty, contracts, commercial dealings, and contested titles to land. To resolve these cases, Marshall applied principles of common law and equity. Contrary to the arguments of other scholars (see William M. Wiecek, *Liberty under Law: The Supreme Court in American Life.* Baltimore: Johns Hopkins University Press, 1988, 32–33), Hobson demonstrates that Marshall paid careful heed to precedent and realized that certainty in law was an important value.

As Hobson's account makes clear, Marshall cannot accurately be seen as a proto-New Dealer or as a herald of the activist Warren Court. Hobson cogently observes that Marshall "was not a precursor of modern liberal nationalism or of the positive, interventionist, regulatory state of the twentieth century" (p. 20). The author presents a powerful rejoinder to those scholars and jurists who have distorted Marshall's legacy in order to cast a veneer of historical legitimacy over the constitutional revolution of 1937 and the rapid growth of federal regulatory authority.

In contrast to Hobson's work, Jean Edward Smith in *John Marshall: Definer of a Nation* does not offer fresh insights into Marshall's constitutional philosophy. Instead,

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he has written a readable and comprehensive biography of the chief justice. Smith devotes much of his energy, and nearly half of this hefty volume, to Marshall's prejudicial career. Thus, Smith discusses in detail Marshall's family background, legal education, marriage to the often-ailing Polly Ambler, success at the Richmond bar, acquisition of large tracts of land, and early forays into Virginia politics. Disputing the once-accepted notion that Marshall received only a skimpy legal education, Smith demonstrates that Marshall enjoyed superior instruction in law by the standards of the era.

Of particular importance was Marshall's service in the Revolutionary army. This formative experience left a deep impression on the future chief justice. Marshall came to lionize George Washington, of whom he would later write a sympathetic biography. The wartime experience also convinced Marshall of the need for an effective national government.

An enthusiastic proponent of the new federal constitution in 1787 to 1788, Marshall gradually emerged as the foremost leader of the Federalist Party in Virginia. In the years of the early republic he held a variety of political offices, was part of the delegation to France during the XYZ Affair, and served as secretary of state under President John Adams. For all his achievements in the political arena, chance played a determining role in shaping Marshall's career as chief justice. When John Jay declined reappointment as chief in January 1801, the lame duck Adams turned to his secretary of state to fill the vacancy. Smith suggests that "the pace of events forced the choice" (p. 15) and that in retrospect "the choice appears inevitable" (p. 278). Adams needed to name promptly a Federalist who would accept the nomination and be confirmed by the Senate; otherwise he would lose the opportunity to select the next chief justice. Marshall was happily at hand.

The early years of the Supreme Court were difficult. The tribunal that Marshall joined in 1801 possessed neither prestige nor authority. Although the Court had rendered a number of significant decisions (see William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth.* Columbia, S.C.: University of South Carolina Press, 1995), its image was tarnished by the perception that the justices too often acted as partisans of the Federalist Party. Moreover, the justices were required to preside at circuit courts in each state, an onerous task that occupied much of their time.

Smith does a good job of explaining how Marshall set out to strengthen the Supreme Court as an institution. Rejecting the traditional practice of having each justice prepare an individual opinion, Marshall persuaded his colleagues to issue a single opinion. Marshall himself usually spoke for the Court. Yet Smith convincingly insists that Marshall "was the moderator, not the master, of the Court" (p. 402) and that the other justices were not ciphers, but full participants in a process of collective decision-making. Marshall also moved to reduce the partisan image of the Court. Central to this endeavor was his determination to separate legal issues from political questions and to avoid being drawn into dealing with matters best resolved by the political

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branches. To this end, Smith notes, Marshall was careful to steer clear of needless confrontations with the incoming Jefferson administration.

On a related topic, Smith gives sustained attention to Marshall's troubled relationship with his second cousin, Thomas Jefferson. The two men were separated by political affiliation and temperament. The convivial Marshall usually maintained friendly ties even with political opponents, but he disliked and distrusted Jefferson. The animosity was certainly mutual. According to Smith, Marshall's handling of the Burr treason trial in 1807, including the issuance of a subpoena to Jefferson, led to the complete estrangement of the chief justice and the president. Smith argues however, that despite their differences both Marshall and Jefferson pursued an essentially moderate course designed to safeguard judicial independence and remove the Supreme Court from politics.

Smith weaves together the major cases appearing before the Supreme Court, political events of the day, developments in Marshall's personal life, and Marshall's dealings with the other justices. There is little sustained legal analysis, but Smith places the significant rulings of the Marshall era in a broad context. With respect to *Marbury,* Smith agrees with Hobson's assessment that "Marshall's assertion of the Court's authority to declare an act of Congress unconstitutional was not controversial" (p. 324). Likewise, Smith argues that *McCulloch* was a defensive decision that "did not so much expand federal sovereignty as restrict state sovereignty" (p. 445).

As indicated by the title, a celebratory tone pervades Smith's work. To be sure, there is much to applaud in Marshall's life. But one must be careful not to assign iconic status, even to Marshall. Surely George Washington and Abraham Lincoln did as much to define the United States as Marshall. Moreover, the chief justice never concealed his intellectual debt to Alexander Hamilton. Occasionally, Smith makes extravagant claims for Marshall. For example, he declares that Marshall "transformed the Constitution from a compact among the states into a charter of national life" (p. 19). Yet as Smith himself demonstrates, the compact theory of the union was widely rejected before Marshall became chief justice. Notwithstanding fulminations against the chief by Virginia's Old Republicans, it does not appear that Marshall deserves most of the credit for the demise of the compact theory.

Both authors explore at length the pivotal role of property rights in Marshall's constitutional philosophy. The framers of the Constitution, of course, saw respect for the rights of property owners as essential for the enjoyment of liberty (see James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2d ed. New York: Oxford University Press, 1997, 42–58). Marshall's views were fully congruent with this emphasis on property rights. Smith points out that by the 1780s Marshall believed in "the unalienable right to possess, enjoy, and augment private property" (p. 108). He adds: "For Marshall, liberty centered on the right to be secure in one's property" (p. 116). Hobson makes clear that in addition to the philosophical link between liberty and property, Marshall's thinking about property

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ownership had a utilitarian dimension. According to Hobson, Marshall was convinced that "strong constitutional protection for property and investment capital would promote national prosperity" (p. 75).

Not surprisingly, therefore, defense of property rights was one of the prime tenets of Marshall's jurisprudence. The chief justice relied on the contract clause to safeguard property and contractual rights against abridgment by the states. Hobson explains that in Marshall's eyes, the contract clause "was the most valuable provision of the new Constitution" (p. 24). Marshall's broad reading of the contract clause to encompass public contracts, such as state land grants and corporate charters, has generated controversy. A number of scholars have argued (see, for instance, Benjamin F. Wright, *The Contract Clause of the Constitution*. Cambridge, Mass.: Harvard University Press, 1938) that Marshall enlarged the contract clause beyond the intent of the framers by applying it to public contracts. Both Hobson and Smith emphatically dispute this view. They stress that the contract clause was phrased in general terms and that Marshall was interpreting the clause in a manner consistent with its original meaning. The chief justice simply construed the contract-clause in accord with its language. The authors make a compelling case that Marshall's contract clause decisions were faithful to the intent of the framers and that other scholars have followed the wrong historical path. Their reasoned conclusions should go far in eclipsing the erroneous but frequently repeated canard that Marshall unduly stretched the reach of the contract clause.

The modern Supreme Court has wandered far from Marshall's vision of a robust contract clause. Since the New Deal era, the contract clause has been relegated to a distinctly secondary place in the constitutional order. Indeed, Justice John Paul Stevens directly contradicted Marshall when he observed (*Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 502 [1987]) that "the prohibition against impairing the obligation of contracts is not to be read literally." The current propensity on the part of justices to downplay the contract clause inverts Marshall's insistence on the inviolability of contracts. It also underscores how selective, if not unprincipled, is the practice of wrenching Marshall's nationalistic sentiments from context in order to buttress claims of unlimited federal authority, while ignoring the property-rights focus of his jurisprudence.

In sum, these outstanding volumes deserve the careful attention of all persons interested in constitutional history and the formative years of the American Republic. Hobson's book will likely become the definitive study of Marshall's judicial thought. For his part, Smith has written the best modern biography of Marshall.

JAMES W. ELY JR.
Vanderbilt University School of Law

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✦ The Life of Herbert Hoover, vol. 3, Master of Emergencies, 1917–1918

By George H. Nash

New York and London: W. W. Norton, 1996. Pp. xii, 656. $45.00.

This volume, covering the period of American belligerency, examines Herbert Hoover's activities as he headed the United States Food Administration while continuing to oversee the Commission for Relief in Belgium. As in the earlier parts of this biography, George H. Nash carefully leads the reader through masses of intricate detail, evaluates his subject sympathetically and critically, and relates Hoover's behavior as a public figure to his personality as well as to circumstances he faced. What emerges is the picture of formidable bureaucrat, a believer in tempered market capitalism, grappling with the problems of a command economy. At the same time, Nash presents an enlightening, if not entirely inspiring, picture of the way Americans on the home front undertook the burdens of the Great War. His work should be of particular interest to scholars and general readers of presidential biography and history, to persons interested in economic mobilization during World War I, and to students of bureaucratic turf warfare.

Hoover's task was highly demanding. He had to create, staff, and run an organization that would feed the American army, supply the Allies with much of their meat and grain, and assure adequate food supplies to American civilians—all this after a poor harvest and with a defective transportation system and while German submarines were doing their best to keep food from crossing the Atlantic. The obstacles at home were formidable, too: "progressives" wary of allocating power to the businessmen who worked for the Food Administration; politicians and other bureaucratic leaders suspicious of Hoover himself; workers who Hoover feared might revolt if not given adequate supplies of bread; producers and middlemen who dealt with one another as adversaries; and large differences in the willingness of Americans to sacrifice for their country, with many people viewing the war as an opportunity to fill their pockets.

Although Nash does not say so, the food administrator's tactics were in many respects typical of the way the Wilson administration mobilized the American economy. Like the administration as a whole, Hoover created a system of centralized management, which he considered almost a variety of socialism, but with built-in mechanisms that would make it self-destruct when the war ended. For instance, he staffed his organization with borrowed business executives who would go back to their companies when the emergency had passed. Like other agencies, such as the Treasury Department and the War Industries Board, the Food Administration staged public demonstrations as a way of building support for its programs and issued floods of propaganda. Its appeals to patriotism (and the implication that those who did not

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cooperate were unpatriotic) helped induce volunteering. Where that was insufficient, Hoover, like other administration executives, developed means to compel the public to do what the government wished. At the same time, believing profits were an essential motivator in war as in peace, he saw to it that even inefficient producers were paid enough to be profitable. Like many of the administrators of the American war economy, he often approached his objectives obliquely, using what he called "engines of indirection" (p. 15).

Although he was known among his associates for bluntness and honesty, Hoover relied to a large extent on deception and manipulation. Privately he described his job as food "dictator," but he referred to himself in public by the softer title of "administrator." He "cooked" official records when it served his purpose and sought to suppress information at odds with his programs. He told his critics, at least in the early months, that he was not fixing prices, only "stabilizing" them. Yet he knew very well that he had to fix prices, and to do so he stretched his authority under the law. The Lever Act of 1917 had given him the ability to license food wholesalers and retailers but not to decide what they should charge. So the Food Administration simply ruled that no wholesaler or other food handler that it licensed could sell any food to businesses that charged "unreasonable" amounts. Always determined to use food as an instrument of warfare (in his own mind, apparently, America's chief instrument of warfare), Hoover was prepared to turn the screws on anyone—including neutral countries, allies, and interest groups at home—who interfered with his program. When things went wrong, his publicity apparatus placed stories in the press or Hoover himself testified about how something or someone else (the weather, which really was awful, the hog farmers, the railroad administration) was responsible for the problem.

Things did go wrong much of the time, and Hoover found himself grappling with unintended consequences of his agency's actions and of contradictions within his program. He tried both to curb demand for scarce products and to keep prices down. Substantial increases in the cost of food would have led to hoarding and more scarcity and eventually, perhaps, to urban riots. Yet low prices helped sustain the quantity demanded he was trying to limit. To reduce wheat consumption he compelled bakers to produce "victory" bread containing other grains, such as corn. The price of corn began to rise, threatening to increase the cost of corn-fed livestock. He urged farmers and ranchers to produce more. They did. He urged homemakers to conserve meat with "meatless" days. They complied. But then, as tens of thousands of pigs poured onto the market, unleashed by farmers who thought Food Administration policies would lead to lower prices, Hoover found himself facing an enormous glut. He implored farmers to plant more wheat, promising to pay a guaranteed price. In 1918 they produced so much that he ran out of money to pay them. Reluctant to end the conservation programs, which he felt were creating a necessary psychology of national self-denial, and unable, even if he had wanted to, to nullify price supports, he turned

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to the Allies to rescue him—to take more pork and to buy a large part of the American wheat crop in advance.

"Whenever you begin to tamper with a normal course of commerce," Hoover remarked, "you have to keep on tampering" (p. 297). Looking at the vicissitudes he faced, and helped to create, it might be tempting to see his experience as proof that a command economy cannot work. Yet it did work well enough in 1917 and 1918 to get the United States through the war. Despite all the problems and complaints of the wheat farmers and hog raisers, of the tomato lobby and angry meat packers, of sugar growers and congressmen, Hoover accomplished what he had set out to do. Of course it was just a short war—at least for the United States.

The Food Administration arranged to take reasonable care of all its clients. The Allies were fed, even Belgian civilians who had approached starvation. In America, workers actually ate more meat than before 1917. Producers and middlemen made money, if not always as much as they wished. By the end of the war Hoover appeared to have earned the respect that ordinary citizens accorded him, and the adulation his subordinates offered their "chief." Astute planning, careful coordination with President Woodrow Wilson, stout defense of Food Administration policies, an effective public relations machine, and a willingness to shift tactics when necessary enabled Herbert Hoover to emerge as a civilian war hero.

George Nash's account of these developments contributes to the ongoing rehabilitation of a man whose immense prestige dissipated rapidly during the Great Depression. It leads one to ponder why this protagonist, who coped so well with a succession of wartime crises, fared so poorly, despite considerable effort, in the economic collapse of later years. He was as tough and determined as the man who succeeded him as president and, at times, as evasive. Like Roosevelt, the food administrator managed news media effectively, at least during the war. He was every bit as willing to ignore theory to secure his goals and flexible enough, in the emergencies of 1917 to 1918, to alter programs that weren't working.

Perhaps Hoover changed by 1929. Or maybe his later difficulty arose from his absence of charm, his stolidity and inability to look people in the eye, his unease as a public speaker, or his gloomy manner of describing problems. Perhaps it all went back to the way he had felt after he was orphaned as a child—as an outsider. There are hints in this volume of why Hoover, who overcame staggering problems during the war, found it so hard to cope with the crisis of his presidency.

We look forward to Nash's insights into such matters as he continues his study of this distinguished, flawed, and often misunderstood public servant.

RONALD SCHAFFER
California State University, Northridge

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✦ Beyond the Broker State: Federal Policies Toward Small Business, 1936-1961

By Jonathan J. Bean

Chapel Hill: University of North Carolina Press, 1996.
Pp. xiv, 281. $45.00 cloth, $16.95 paper.

The week of June 2 to 6, 1997, was designated National Small Business Week. One newspaper article noted that 96 percent of all U.S. businesses are classified as small businesses and that "the message is clear: small business is a big deal." Jonathan J. Bean can well attest to that. In *Beyond the Broker State: Federal Policies Toward Small Business, 1936-1961*, he describes the development of the federal government's policies toward small businesses from the Great Depression through the Eisenhower era. Bean discusses the political process that led to two significant laws—the Robinson-Patman Act and the Miller-Tydings Act—and finally to the Small Business Administration.

According to Bean, the rise of the federal government's concern with small businesses has several roots. A very loosely connected root can be traced back to Jeffersonian Agrarianism. Another root comes from the concern with the growth of "big" business and the development of the antitrust laws in the late nineteenth century. A third root is found in the egalitarian ethic that is part of the American tradition and found expression in the permanent federal income-tax law passed in 1913. These ideological roots combined with the crisis of the 1930s and "political entrepreneurship" to give rise to federal intervention on behalf of small businesses. One of the leading advocates of federal intervention for small business was Representative Wright Patman (D.-Tex.), and the various sources can be seen in Patman's statement that "The wide distribution of economic power among many independent proprietors is the foundation of the Nation's economy. Both Franklin and Jefferson feared that industrialization would lead to a labor proletariat without property and without hope" (p. 5). In the view of Patman and others, a strong and thriving small-business sector provided protection against a concentration of power.

The initial response in the mid-1930s was enactment of the Robinson-Patman Act and the Miller-Tydings Act. When the former was passed in 1936 its sponsors declared it to be the "Magna Carta" of small businesses. In fact, it was framed with small, independent retail businesses, not small manufacturing in mind. Both acts grew out of the anti-chain-store movement of the 1920s and 1930s and were aimed at preserving small, independent retail businesses against the rise of retail chain stores. Initially there was a call to amend the antitrust laws to allow manufacturers to fix minimum retail prices and reduce or eliminate the chain stores' advantages. By the early 1930s states were beginning to impose taxes on chain stores. Though chain-store critics had called the situation a "crisis" for years, it took the real crisis of the Great Depression to get national anti-

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chain-store legislation. The Robinson-Patman Act of 1936 required manufacturers to justify discounts to chain stores in an attempt to limit or eliminate such discounts. The 1937 Miller-Tydings, or "Fair Trade," Act allowed manufacturers to specify the minimum retail price of a product "in order to protect small retailers from the price competition of the chain store" (p. 42).

The framework Bean adopts to explain this and subsequent small business legislation is crisis, ideology, and political entrepreneurship. As mentioned already, many Americans had an ideological predisposition toward small business, considering it the "backbone of democracy." In times of real crises political changes at the federal level could be initiated. The Great Depression, World War II, and the Korean War constituted such crisis periods when action on a small-business agenda could be pushed forward. The third element of this triad was "political or ideological entrepreneurship."

Other theories have been proposed to explain the growth of government in the twentieth-century United States. The Progressive explanation argues that politicians expanded government to provide for the disenfranchised population. As Bean notes, however, "the Progressive interpretation failed to explain why corporate executives had so much influence on the formulation and administration of Progressive legislation" (p. 6). The "broker-state" model maintains that policymakers brokered between competing interest groups seeking government assistance. Bean identifies "corporate-liberal," "pluralist," "neopluralist," "public choice," and "neo-Marxist" versions of the broker-state model. He contends that the broker-state model of the welfare-regulatory state's growth in the twentieth century tends to ignore the role played by policy entrepreneurs and that this role is especially important in the development of small-business legislation.

Bean makes a convincing case that, at best, support from small businesses for federal intervention was narrow rather than widespread. However, policy entrepreneurs such as Wright Patman, Joseph Robinson, John Miller, and Millard Tydings listened to pleas from some individuals and specialized small-business interest groups and responded to them. Neither bill had the kind of impact its supporters anticipated. The Robinson-Patman bill turned out to be ambiguous, and it accelerated franchising as a means of avoiding its reach. The FTC's enforcement also took some of the teeth out of the bill. The Miller-Tydings bill did not include a nonsigner clause until the McGuire Act of 1952 and received lackluster state enforcement. Fair trade continued to fall into disuse in many industries, and in 1975 Congress repealed the Miller-Tydings Act.

The Second World War brought a new "crisis" and a new opportunity for the promotion of small businesses. This time, however, small manufacturing firms were the objects of solicitude. Critics argued that the federal government's contracts for war materials production favored big businesses, as did labor shortages and price controls. The 1942 Smaller War Plants Corporation Act (SWPC) was to correct this imbalance. Though the SWPC brought about few changes, surveys showed that small

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manufacturers enjoyed wartime prosperity and few of them complained. Unable to develop a small business constituency, the SWPC expired in 1946.

A new crisis, the Korean War, allowed political entrepreneurs to guide into existence new legislation for small manufacturers. In 1950 the Smaller Defense Plants Administration (SDPA) was established. It too, was ineffective. The Reconstruction Finance Corporation (RFC), one of the largest agencies in the federal government, had survived the Second World War, but tales of its misconduct increased. The new Republican Congress took aim at eliminating the RFC. As the expiration date for the SDPA loomed, a compromise was reached. A Small Business Administration (SBA) was created to assume the roles previously played by the RFC and the SDPA. During the Eisenhower administration the SBA had little effect except as a patronage tool for the Republicans, but the legislation was renewed in 1955, and in 1957 the SBA was given permanent status. The SBA remained a marginal player because of limited funding from the Eisenhower administration and Republican control of the SBA's Loan Policy Board. After John F. Kennedy's election the SBA began to grow, and it has continued to do so. Bean notes that "by the 1980s, the agency was guaranteeing nearly half of the intermediate and long-term credit extended to small businesses" (p. 160).

Bean has given us an important account of how this frequently symbolic small-business legislation came into existence. He shows that the legislation did not have the desired effect, nor was it generally sought by small businesses. The continually repeated and exaggerated warnings of the coming disaster for small businesses were not just premature; they ignored the continuing strength of the small-business sector in the United States. Bean supports his thesis about the importance of "political entrepreneurs" well, thereby explaining how such legislation could come into existence without strong interest groups to foster it.

A few issues merit more discussion. There were two very different types of legislation for small businesses during the era Bean studied. The legislation of the 1930s was clearly aimed at aiding small *retail* businesses, whereas the SWPC of the Second World War and the SDPA of the Korean War were aimed at small *manufacturing* businesses. It is not at all obvious that small retail businesses and small manufacturing businesses had similar interests; in fact, one would expect that often these two groups had conflicting interests. The story of legislation for small independent retailers suggests that after the 1930s this legislation became less and less effective. Did the associations of retail druggists, wholesale grocers, and independent tire dealers, which had been the primary lobbyists in the 1930s, stop lobbying, or was there simply no real crisis small retail businesses could use?

The common thread between the small-retail-business legislation of the 1930s and the war legislation to promote small manufacturing firms is the set of politicians promoting each and the "crisis" phraseology those politicians used. Bean argues that between 1946 and the Korean War the Reconstruction Finance Corporation picked

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up some of the funding of small businesses. This argument suggests that the RFC concentrated its activities on small manufacturing firms, not small retail firms. The Small Business Administration created in 1953 was the Republicans' means of eliminating both the RFC and the SDPA. If so, it was intended to affect small manufacturing more than small retail businesses. I would have liked to have seen more discussion of the different influences of small retail businesses and small manufacturing businesses on the creation and early behavior of the SBA.

In general, Bean argues that the confluence of ideology, crisis, and political entrepreneurship resulted in federal small business legislation. Evidently, the ideology continually lay in the background as political entrepreneurs waited for opportunities to exploit. The emergence of a crisis—the Great Depression, the Second World War, the Korean War—brought the three factors together to produce new federal policies toward small businesses. As Bean points out, from 1953 through the end of the Eisenhower administration, the SBA, through growing, remained a relatively marginal agency, but later it began to grow sharply and by the 1980s was providing around half of the intermediate- and long-term credit that small businesses obtained. Does the intersection of crisis, ideology, and political entrepreneurship explain this growth? What crises explain it? Or did political entrepreneurship change so that a real crisis was no longer required?

These questions may be material for an additional book, as no one can fault Bean for not extending his research into the post-1961 years. Overall he has done us a great service by dissecting the development of federal policies toward small businesses from 1936 to 1961. His book is excellent, and I heartily recommend it.

GENE SMILEY
Marquette University

✦ Drug Policy and the Decline of American Cities

By Sam Staley

New Brunswick, N.J.: Transaction Publishers, 1992.
Pp. 257. $39.95 cloth, $24.95 paper.

In *Drug Policy and the Decline of American Cities*, Sam Staley considers many of the issues at stake in the debate over drug legalization. Objective observers have long noted that prohibition harms many people, including those who do not use illicit drugs, especially the inner-city poor to whom Staley pays special attention. After reviewing a wide variety of arguments for legalization and placing them under libertarian, cost-benefit, and public health rubrics, he proceeds to consider a fourth category: economic development. He concludes that in general "drug prohibition undermines the process of economic development in America's cities" (p. 6).

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Staley's explanation of the dynamics and interdependence of various markets may be his book's most valuable contribution. He argues that the drug laws cause, and are caused by, economic problems in the inner cities. The violence endemic to the illicit drug markets serves as a case in point. Staley argues that to some extent the violence arises from government's growing failure to respect and protect property rights, as evidenced by everything from regulation and taxation to the taking of private property without just compensation. As businesses abandon the poorly protected, high-risk inner cities, drug dealing becomes a relatively more attractive option for the remaining residents. In turn, the negative externalities of an increasing drug trade discourage new or existing legitimate business ventures. And so on, in a vicious downward spiral.

Labor markets also display harmful reciprocal effects. While inner-city government schools leave young people ill prepared for entering the labor market, legitimate employment opportunities become harder to find as business stagnates or declines. At the same time, potential workers consider the variety and generosity of welfare benefits available to them as they decide whether to seek or accept employment, often choosing not to participate in the legal labor market.

Throughout the book Staley aptly describes how markets function, clearly illustrating the principle that legal and cultural institutions go far to determine incentives and thereby to influence behavior. For example, he argues that the greater part of the high earnings of drug dealers amounts to a compensating wage differential required to entice workers into a field that carries some stigma and exposes them to physical and legal dangers.

The workings of the market also explain part of the difficulty of suppressing the drug trade. In the past, when government has changed "the rules of the game" by modifying the size or scope of enforcement, it has influenced specific details of the market but has not greatly affected the overall market. As Staley notes, "changes in narcotic control strategies by governments can alter the supply conditions and underlying cost structure of the industry" (p. 146), but "drug importers have shown a remarkable ability to shift modes of transportation from year to year, depending on the potential for interdiction" (p. 201).

Staley compares and contrasts formal and informal markets. In both, suppliers have incentives to provide high-quality goods and to search for innovative products and services. In both, suppliers respond to price changes, whether those changes arise from altered consumer demands or from selective enforcement of the law. But formal and informal markets also differ in some important respects. In particular, informal markets give greater priority to secrecy and display sporadic and violent administration of "justice." As Staley emphasizes, the drug market is "a stilted, perverse attempt at economic rejuvenation" (p. 7) in an environment of declining legal economic activity.

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These observations call to mind Hernando de Soto's fine book on informal markets in Peru (*The Other Path: The Invisible Revolution in the Third World*. New York: Harper & Row, 1989). In each case studied by de Soto, people optimize amid pervasive government regulation. Informal property rights evolve. Although not as effective or comprehensive as the rights in formal markets, they are better than none at all. Likewise in the drug market. For instance, workers acquire skills. This mode of "schooling" may not be the best arrangement, but it is better than nothing. In *Urban Illusions: New Approaches to Inner City Employment* (New York: Praeger, 1987), Michael Bernick observes that among those he tried to empower in San Francisco, the high-school dropouts had greater basic skills than the high-school graduates.

Staley devotes much attention to the market structure and internal organization of the illicit drug industry. Given that most drug users are middle-class people and do not live in the inner city, why are the inner cities the primary locus of drug distribution? Staley notes that "central cities provide a variety of natural defenses against detection by law enforcement authorities" (p. 8). He points to an available labor supply, relatively easy access to drug users and lower-level dealers in surrounding areas, and some advantages peculiar to the inner city, including high population density and great cultural diversity. Under prohibition, the inner city provides the lowest-cost distribution center and, most important, a "convenient hiding place" where dealers "can disappear" (p. 149).

Of course, even though "government failure" may abound in efforts to suppress the drug trade, conditions would not necessarily be better if the drug trade were legalized. Staley considers several criticisms of legalization. Some commentators have argued that "society's best interests" should take precedence over an individual's freedom to choose. Staley refutes this point of view. Besides pointing to growing evidence of the damage prohibition wreaks on society, he gives a number of examples of how decision-making procedures intended to promote society's best interest may be reconciled with the interests of individuals—for instance, even though "the majority rules" under democracy, individuals who belong to losing minorities retain rights. Some writers have worried that legalization would dramatically increase drug use and addiction. As Staley documents, what little evidence we have about the effects of legality on quantity demanded seems to show that demand is inelastic. Although this evidence is not completely compelling, it suggests that worries about greatly increased drug use and addiction may be overblown.

Perhaps the strongest case for prohibition arises from concerns about the addictive properties of drugs. Staley effectively marshals evidence against this case. First, he notes that addicts do not dominate the market and argues that if addiction were largely chemical, most users would be addicts. Further, he provides voluminous data on rates of use versus addiction, and rates of availability versus use. These data cast much doubt on the validity of the addiction argument. Second, he observes that the concept of addiction is highly subjective and argues that most people

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exhibit considerable control over their intake of drugs. Third, he notes that consumers of legal drugs such as alcohol and tobacco have demanded products with reduced strength. He concludes that "addictive behavior is not as automatic nor as prevalent as the press or many politicians claim" (p. 95).

Finally, Staley considers another provocative question: Why have the costs of prohibition become increasingly obvious over the past thirty years? The answer has several parts: drug use has become more acceptable in American culture and therefore more widespread, increased income has fueled increased demand for drugs, the Mafia's monopoly power has diminished as advances in transportation and communication have fostered increasing competition, and higher marginal tax rates have made black market activities relatively more attractive. Staley's theory of the reciprocal effects of the drug market and urban economic development certainly provides an important part of the answer as well. With population movement to the suburbs, declining educational quality, expanding welfare programs, and a plethora of government policies reducing legal job opportunities, the growth of drug dealing should hardly have come as a surprise.

Staley notes that despite the increasing success of the government in seizing drugs and obtaining more convictions for drug manufacturing and distribution, consumer demand has increased and drug prices have remained stable or have decreased. He believes that if the war on drugs continues apace, the public ultimately will recognize that it cannot be won and that its conduct imposes huge costs, especially on the inner-city poor.

D. ERIC SCHANSBERG
Indiana University Southeast,
New Albany

✦ Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment

By Paul Pierson

Cambridge, England: Cambridge University Press, 1994.
Pp. viii, 213. $54.95.

In 1935 the political scientist E. E. Schattschneider observed that "new policies create a new politics" (*Politics, Pressures and the Tariff.* New York: Prentice-Hall, 1935, p. 288). A new policy creates or broadens the political support for the policy among the direct beneficiaries and the policy-specific suppliers, bureaucrats, and advocacy groups. Because most people are more motivated to protect the benefits they have than to seek the potential benefits of a different policy—more concerned about the bird in the hand than the two in the bush—the politics of new policies and the politics of retrenchment are asymmetrical. In contemporary terms, public policy is path

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dependent: the current portfolio of policies depends very much on the policies of the past. This perspective provides some reason to advance the "ratchet hypothesis" about government spending, a hypothesis promoted by several analysts including the esteemed editor of this journal.

Paul Pierson, a professor of government at Harvard, writes from this perspective about the new politics of the welfare state. His

> central thesis is that retrenchment is a distinctive and difficult political enterprise. It is in no sense a simple mirror image of welfare state expansion.... Retrenchment advocates must operate on a terrain that the welfare state itself has fundamentally transformed.
>
> Welfare states have created their own constituencies. If citizens dislike paying taxes, they nonetheless remain fiercely attached to public social provision. That social programs provide concentrated and direct benefits while imposing diffuse and often indirect costs is an important source of their continuing political viability. Voters' tendency to react more strongly to losses than to equivalent gains also gives these programs strength.
>
> Retrenchment advocates thus have their work cut out for them. Almost always, retrenchment is an exercise in blame avoidance rather than in credit claiming. (pp. 1–2)

For the most part, Pierson makes good use of this perspective in analyzing the politics of welfare policy during the Reagan and Thatcher administrations. His primary challenge is to explain why there was relatively little change in welfare policy in either government, despite a substantial decline in the urban and labor representatives who had been the traditional supporters of welfare-state expansion. Comparison of the U.S. and British experience leads him—correctly—to dismiss two institutional differences: Reagan faced a Democratic House for his whole administration; and the structure of government is much less centralized in the United States than in Britain. Neither of these differences seems to have had much effect on welfare policy.

The politics of retrenchment invited both governments to use a common set of tactics: obfuscation, division, and compensation. The political price of retrenchment was reduced by obscuring, diffusing, and deferring the negative effects; by tightening eligibility rules and thereby reducing benefits for some recipients but not for others; by separating beneficiaries from providers; and by maintaining compensation to the beneficiaries who currently enjoyed the largest public support. Pierson devotes most of the book to a detailed documentation of the use of these tactics to shape pension, housing, income maintenance, and health-care policies. The commentary is snide but generally accurate.

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> Pierson is profoundly wrong, however, on two major issues. He claims that
>
> both Reagan and Thatcher offered a virtually complete rejection of all but the most residual social policies. Although both the political strategies adopted and the degree of success achieved varied from program to program—and usually fell well short of such ambitious goals—the reformers' agenda in each case was radical retrenchment. (p. 49)

Pierson offers no evidence for this extraordinary claim. In fact, at no time did either Reagan or Thatcher make a frontal attack on the welfare state. The most radical Reagan proposals, for example, were the misconceived Social Security proposal of May 1981 and the New Federalism proposal of February 1982, neither of which had any congressional support. The other major (and more common) error is the claim that Reagan's tax policies "weakened the federal government's ability to finance social programs." In fact, the federal revenue share of GDP in 1989 was as high as in 1979, the prior cyclical peak, even though the 1979 share was fueled by higher inflation. The increase in the deficit was driven by the defense buildup and the increase in interest payments due to the *temporary* decline in revenues during the recession of the early 1980s.

A number of other errors are less important but no less common. There is no obvious reason why a market economy underinvests in health care, housing, and economic security. The oft-repeated story about the QWERTY keyboard is not historically accurate. The tax deduction for home mortgages is not a massive subsidy to house ownership, but is necessary to make the tax code neutral between owning and renting. The "biggest programmatic losers in the 1980s" were not universal programs such as Social Security and unemployment insurance but selective means-tested programs. Private health-care systems do not have a special difficulty controlling costs. Sharp tax cuts are not inconsistent with the tight monetary policy necessary to reduce inflation. One wonders how these errors escaped professional review, but they are peripheral to Pierson's main thesis.

In the end, Pierson attributes too much stability to the welfare state. Shortly after his book was published, Congress and a New Democrat president approved the most substantial reform of income maintenance policies and agricultural subsidies in 60 years. Congress is making important changes to Medicare in 1997. The necessary public debate on Social Security has been pulled forward much faster than anyone anticipated. And the New Labour government in Britain seems committed to Tory policies but, of course, with more noble motives. My fellow ideologues may prefer a frontal attack on the welfare state, under constitutional or moral banners, but that strategy is probably politically unwise. A persistent series of flank attacks, however, may be enough to turn the tide.

WILLIAM A. NISKANEN
Cato Institute

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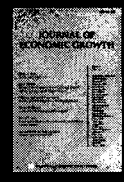
A Focus on Economic Growth and Dynamic Macroeconomics

Journal of Economic Growth



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Etceteras . . .

Puritanism, Paternalism, and Power

"LIVE AND LET LIVE" would appear to be a simple, sensible guide to social life, but obviously many Americans reject this creed with a vengeance. They find toleration so unpleasant that they support the imprisonment of hundreds of thousands of individuals whose personal behavior they regard as offensive. Why do so many Americans favor the use of coercive sanctions to enforce repression? The answer lies in our history.

Puritanism

Politicians and other patriotic posturers like to declare that the Europeans came to America seeking freedom. The claim is at best a half-truth. In the colonial era, most Europeans arrived in North America bound in some form of indentured servitude. Disregarding these servants, one finds that the free colonists sought mainly to improve their economic well-being.

To be sure, some of them, including the early arrivals in Massachusetts, were fleeing religious oppression. But the Pilgrim Fathers had absolutely no intention of establishing a community in which individuals would be free to behave according to the dictates of their own consciences. The Puritans had already seen the light, and by God they intended to use all necessary means to ensure that everybody comply with Puritan standards. Far from free, their "City upon a Hill" was a hardhanded theocracy.

For them, pleasure seemed the devil's snare. Their vision of the good life was austere, and they looked askance on the possibility that others might embrace hedonism. In H. L. Mencken's famous characterization, Puritanism was "the haunting fear that someone, somewhere, may be happy" (*A Mencken Chrestomathy*. New York: Vintage Books, 1982, p. 624). Moreover, if the Puritans suspected that someone might be having fun, they had no compunction about using government coercion to knock some sense into the offender. Mencken might have had this proclivity in mind when he observed, "Show me a Puritan and I'll show you a son-of-a-bitch" (p. 625).

In view of the Puritans' dispositions, it is unfortunate that they exerted an immense and lasting influence on American social and political affairs. Puritanism's

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"central themes recur in the related religious communities of Quakers, Baptists, Presbyterians, Methodists, and a whole range of evangelical Protestants," and Puritanism "established what was arguably the central strand of American cultural life until the twentieth century" (Andrew Delbanco, "Puritanism," in *The Reader's Companion to American History*, edited by Eric Foner and John A. Garraty. Boston: Houghton Mifflin, 1991, p. 893). Even today, ghosts of the Pilgrim Fathers haunt the land.

Paternalism

Paternalists are more ambitious than Puritans. Whereas the latter are content to steer people away from sinful behavior, the former go further, seeking also to promote the worldly health, safety, and welfare of their wards, coercively if need be. Of course, paternalists direct their deepest compassion toward saving the children.

In the nineteenth and early twentieth centuries, when American social life was more rigidly hierarchical and dominated by WASPs, the paternalistic impulse came naturally to those who took themselves to be the respectable class in society. But in their efforts to uplift the rabble, they perceived a need to rid the poor wretches of their vices. Hence the succession of campaigns against, among other things, drinking alcohol, smoking cigarettes, and engaging in all unseemly sexual activity, including autoeroticism. A century ago, groups such as the Woman's Christian Temperance Union and the Anti-Saloon League had legions of supporters. The Anti-Cigarette Movement campaigned vigorously, especially against smoking by women and children, and the Social Purity Movement, followed shortly after 1900 by the Social Hygiene Movement, strove to stamp out pornography, prostitution, marital infidelity, and masturbation.

Government Power

As the Eighteenth Amendment of the U.S. Constitution (1919) reminds us, the better sorts did not hesitate to employ government coercion to promote their rehabilitation of society. Previously, they had saddled the nation with the Comstock Act (1873), which forbade sending sexual information through the mail, and the Mann Act (1910), which banned taking women across state lines for immoral purposes. In many local jurisdictions they had obtained legal prohibitions of smoking by women and of commerce in liquor.

In these and many other ways, the respectable campaigners shamelessly combined Puritanism, paternalism, and government power. As David Wagner has succinctly expressed the matter in his recent book *The New Temperance: The American Obsession with Sin and Vice* (Boulder: Westview, 1997),

> the Victorian and Progressive Period movements were characterized by what scholarly observers consider an exaggerated...notion of their ability to

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> change behavior, by a huge faith in government's ability to regulate every aspect of private life, and by a strong ethnocentric belief in the correctness of white, Protestant, middle-class social norms. (p. 18)

These crusaders labored under no burden of doubt about the rectitude of their own standards of personal behavior or about their right to impose these standards on everybody else at gunpoint. Although they ceaselessly proclaimed their Christianity, they overlooked some of Christ's admonitions, especially, "judge not, that ye be not judged" and "he that is without sin among you, let him first cast a stone."

Respite and Calamity

In 1933, after a decade of gang warfare and growing disrespect for law, Americans abandoned the "great experiment" and repealed the Eighteenth Amendment. The homicide rate, which had risen by about 50 percent during the previous fifteen years, immediately began a secular decline that continued until the 1960s (U.S. Bureau of the Census, *Historical Statistics of the United States.* Washington: Government Printing Office, 1975, p. 414). Mark Thornton, a careful student of these events, concludes that "the repeal of Prohibition appears to be the best explanation for the dramatic reversal in 1933 and the return to the long-run decline in crime rates" because "alternative theories have a difficult time explaining the continuous decrease in crime during the remainder of the 1930s" (*The Economics of Prohibition.* Salt Lake City: University of Utah Press, 1991, p. 124).

Despite the continuation in force of the Harrison Narcotic Act (1914) and passage of the prohibatory Marijuana Tax Act (1937), the crusading class largely shifted its attention away from domestic uplift and toward resistance to fascism and communism during the 1940s and 1950s.

In the 1960s, however, the tidy world of the self-righteous came crashing down as antiwar protesters, hippies, and other elements of the counterculture flaunted their disrespect for the bourgeoisie and its standards of conduct. The long-haired, free-loving, dope-smoking scorn of youths, poor people, and blacks—the very groups traditionally regarded as most in need of strict supervision and control—goaded the guardians of respectable society unbearably.

War on Drugs

In response, government officials pandering to the ire of the well-behaved "silent majority" declared a "war on drugs," which meant of course the punishment of selected individuals for the crime of offensive personal behavior regardless of any harmful effects on nonconsenting parties. As a political tactic, this offensive was a no-brainer. "For political leaders, temperance wars, like foreign wars, are mobilizations that can serve as strategies to excite the masses of people and, for this reason, enjoy

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continued use" (Wagner, p. 59), which explains the Comprehensive Drug Abuse Prevention and Control Act (1970), the Comprehensive Crime Act (1984), and the Anti-Drug Abuse Act (1988), among many other enactments. The drug war helped to divert citizens from dwelling upon such annoyances as a futile foreign war, high taxes, obnoxious regulations, poor government services, and dwindling protection of life and property.

In this war the police needed no postgraduate training to discern how to promote their own interests. Drug arrests can be arranged virtually at will to bulk up the score sheet of police accomplishments, and once civil forfeitures became an option in the war on drugs the police had the added opportunity of wantonly seizing private property to enhance their resources (see Bruce L. Benson and David W. Rasmussen, "Predatory Public Finance and the Origins of the War on Drugs: 1984–1989," *The Independent Review* 1 [Fall 1996]: 163–89).

Meanwhile the police and others could blame the use of drugs for the growing violence among youths, especially big-city blacks, when in reality the increased violence occurred mainly because the drug trade was illegal. As Thornton observes,

> violence is used in black markets and criminal organizations to enforce contracts, maintain market share, and defend sales territory. ...Street gangs profit and expand based on their role in organizing retail drug sales. Their violent criminal activity has been a growing and very visible result of the war on drugs during the 1980s and 1990s. (pp. 112, 125)

As the prohibition of commerce in "controlled substances" has spawned a vast, global black market, recently estimated by the U.N. International Drug Control Program at $400 billion in annual sales ("U.N.: Drug Dealing Is 8% of All Trade," *Seattle Times,* June 26, 1997), opportunities for government officials—everyone from street cops to heads of state—to enrich themselves have grown enormously. In several countries, governments appear to be, from top to bottom, in league with the drug traders. In the United States, the news media routinely report the arrests and convictions of police and other government officials for services to drug dealers, and these reports surely represent only the unlucky tip of an iceberg of corruption. David E. Sisk has written, "If the true consequences of such laws [and the extent of] police corruption...were well publicized, supporters of such laws could no longer hide behind a shield of morality" ("Police Corruption and Criminal Monopoly: Victimless Crimes," *Journal of Legal Studies* 11 [June 1982]: 403).

Endless Crusades

Sisk may be right, but I am inclined to think that, no matter how horrible the consequences, the desire to butt into other people's personal affairs, employing the police and even the military as agents, is deeply ingrained in the American national character.

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Gerald Klerman aptly indicts "pharmacological Calvinism"; J. Weeks refers to "apple pie authoritarianism"; Ellen Willis likens the contemporary drug test to the McCarthy-era loyalty oath: "When I say pee, you pee" (cited in Wagner, pp. 76, 162, 171). A 1995 Gallup poll found 85 percent of the respondents opposed to legalizing drugs and 87 percent in favor of greater funding for drug police (cited by Nick Gillespie, "Uncompromising Position," *Reason* 28 [July 1996]: 31). Search the Western world and you will find no other nation similarly obsessed. Europeans, themselves no strangers to government intervention, often view the United States as a nation of lunatics. Notwithstanding its changing forms and temporal fluctuations, the penchant for acting as self-righteous busybodies has animated the bourgeoisie of this country ever since the Pilgrims set foot on Plymouth Rock in 1620. Because it provides an irresistible opportunity for politicians to promote their own interests at public expense, one must expect that we Americans are doomed to an endless procession of costly, futile, and destructive crusades.

It hardly comes as a surprise that the government has not stopped with a war on heroin, cocaine, and marijuana. It is now whooping up, among many other offensives, a jihad against tobacco. Inasmuch as this, like virtually all contemporary attacks on individual liberty in America, comes disguised as a program for "saving the children," who would object? Once the do-gooders condemned "demon rum"; now they demonize cigarettes.

Though the First Amendment of the Constitution enjoins that Congress "make no law...abridging the freedom of speech, or of the press," the Food and Drug Administration has issued detailed regulations governing the advertising of tobacco products, and the agency has ambitious plans for more extensive controls. In this

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disregard for the Constitution, pusillanimously condoned by the courts, the government follows a pattern set earlier in fighting the war on narcotics. As Judge James P. Gray has distinguished himself by saying, "Our present [drug] policy is directly responsible for the material and demonstrable reduction of our cherished liberties under the Bill of Rights" ("A Fresh Approach to the War on Drugs," *Seattle Times,* September 20, 1996). The war on tobacco pushes us farther down the same oppressive path.

Upshot

Alexis de Tocqueville foresaw our present condition when, in the penultimate chapter of *Democracy in America* (edited by Richard D. Heffner. New York: Mentor, 1956), he considered "What Sort of Despotism Democratic Nations Have to Fear." There he envisioned

> an immense and tutelary power...absolute, minute, regular, provident, and mild...like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood...it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd. (pp. 303–4)

As if these conditions were not bad enough, Americans in true Orwellian fashion "have often come to identify with powerful social control as being in their own interest. They often want the state to expurgate drugs or cigarettes" (Wagner, p. 173).

At the end of his provocative booklet, *Smoking and Liberty: Government as a Public Health Problem* (Montreal: Varia in cooperation with the Texas Public Policy Foundation, 1997), Pierre Lemieux contrasts two possible worlds. One is the world of invasive paternalism to which governments in the United States—and likewise in Lemieux's homeland, Canada—progressively consign us. In this world, physical and moral dangers are everywhere, and because individuals are too foolish and weak willed to protect themselves, government must micromanage everybody's personal affairs. The alternative world differs starkly. In it "every individual lives his life as he sees fit, assuming the risks of his joys and the anguish of his death" (p. 92). Lemieux points out that "there is a common denominator between these two worlds: the mortality rate is 100% in both. But the men who live and die are not the same: in the first case, they are slaves; in the second, free individuals" (p. 93).

ROBERT HIGGS

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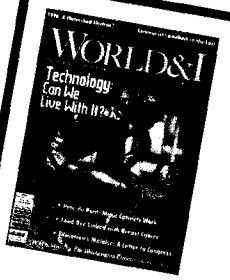

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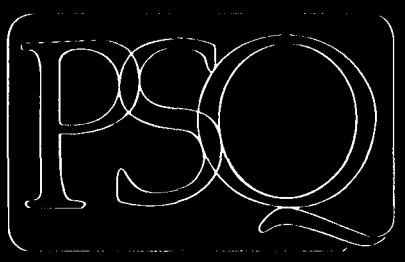

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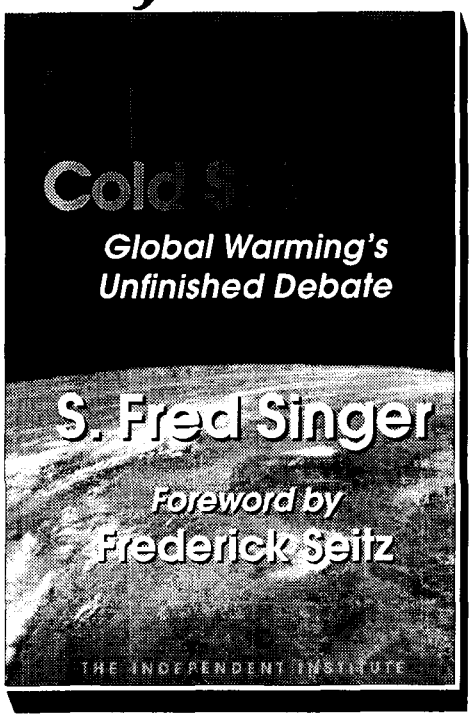

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